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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928 29

No. 642 28

SUPERIOR OIL COMPANY, APPELLANT,

vs.

THE STATE OF MISSISSIPPI EX REL. RUSH H. KNOX, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED JANUARY 21, 1929

(33,951)

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SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN CHANCERY COURT OF HARRISON COUNTY

THE STATE OF MISSISSIPPI ex Rel. RUSH H. KNOX, Attorney General,

vs.

THE SUPERIOR OIL COMPANY

PETITION FOR INJUNCTION

Now comes Rush H. Knox, the duly elected, qualified and acting Attorney General of and for the State of Mississippi and respectfully shows to the Court that the Superior Oil Company is a corporation chartered under the laws of the State of Mississippi and domiciled at Biloxi, Harrison County, Mississippi.

Relator further shows to the Court that said Superior Oil Company is now and has for a long time prior to the filing of this petition been a distributor and a retail dealer in gasoline in Harrison County, Mississippi, and that as such distributor it has been engaged in the sale of gasoline to retail dealers in the State of Mississippi, and as a retailer of gasoline it has been engaged in the sale of gasoline in broken quantities at its places of business in the said State of Mississippi, and that as such distributor it has sold and distributed to various retail dealers large quantities of gasoline, and that as a retail dealer of gasoline it has sold large quantities of gasoline in the State of Mississippi in broken quantities as shown by the statement hereto attached, marked Exhibit "A" and made a part hereof.

Relator further shows to the court that on the first day of November, 1927, and for a long time prior thereto, defendant was and continuously since that time has been engaged in business as a distributor and as a retail dealer of [fol. 4] gasoline in the State of Mississippi, and that as such distributor and retail dealer it was, by the provisions of Chapter 116 of the Laws of 1922, required to report on or before the 20th day of each month to the Auditor of Pub-

lic Accounts all sales of gasoline made within the State, and as a distributor of gasoline and as a retail dealer thereof, it was required to render to the Auditor of Public Accounts on forms prescribed by said Auditor a true and correct statement of all gasoline sold by said retail dealer during the preceding month, liable for the excise tax required to be paid, and to show on said statement the total number of gallons of gasoline sold by it and the name of the distributor or distributors from whom the gasoline was purchased and to show by such statement the amount of gasoline sold by the retailer, if any, on which the excise tax was paid by the distributor, and to pay to the auditor of Public Accounts at the time of the making of the report or statement an amount equal to the excise tax required by law upon all such gasoline sold by it on which the tax was not previously paid by the distributor from whom the gasoline was purchased or obtained, and as a distributor of gasoline it was required, if by the terms of the sale of gasoline by the distributor or wholesaler to the retailer the excise tax required by law upon gasoline was to be paid by the distributor to deliver to the retailer upon the delivery of such gasoline a statement in writing showing the name of the retailer, the date of the sale or delivery, the number of gallons delivered, and agreeing thereby to pay the amount of the excise tax thereon, which statement was required to be signed by the distributor or his agent in charge of said business, and thereupon the distributor became liable and was bound to pay such excise tax, said statements to be sworn to by the distributor or retail dealer before some officer authorized to administer oaths.

[fol. 5] Relator further shows to the Court that by Chapter 115 of the Laws of 1924, the said defendant as a distributor of gasoline and as a retail dealer thereof was required to pay for the privilege of engaging in such business an excise tax of three cents per gallon upon the sale of all gasoline in this State wherein said tax was not paid by the retail dealer as provided by law, and was required to pay said tax as a retail dealer upon the sale, of all gasoline in the State wherein said tax was not to be paid by the distributor as provided by law, said tax of three cents per gallon to be paid upon all gasoline sold pr-or to the first day of April, 1926.

Relator further shows to the Court that the said Superior Oil Company did make and file with the Auditor of Public Accounts a statement showing the total number of gallons of gasoline sold by it as distributor and as a retail dealer in gasoline, said statement showing that the said defendant sold within the State of Mississippi in the regular course of business prior to the first day of April, 1926, and after the 25th day of March 1922 300,758 gallons of gasoline, but defendant did not report any of said gasoline sold to a retail dealer to be re-sold on which the tax was to be paid by the retail dealer; that on said amount of gasoline sold by said defendant in the due course of business to the consumer or consumers and retail dealers there was due to have been paid to the State of Mississippi by the defendant herein an excise tax of $9,022.74, for which amount the said defendant became indebted to the State of Mississippi; that of said amount the said defendant paid to the State of Mississippi the sum of $6,002.52, leaving a balance due by it of $3,020.22, and although frequent demands have been made on said defendant for the payment thereof, no part thereof than as above set out has been paid by said defendant or anyone else, and because of the failure of said defendant to pay said [fol. 6] sum when due, no — else being liable therefor, the said defendant became and is liable for a penalty of five per cent of the amount due, amounting to $151.01, and six per cent interest per annum from date said payment should have been made as provided by law, making a total amount due from January 1st, 1926, until November 1st, 1927, on account of sales as above set out, all of which were made in the State of Mississippi, of $3,412.00, for which sum plaintiff, demands judgment against defendant.

Relator further shows to the Court that the said defendant was on the 1st day of April, 1926, and has been continuously since that time engaged in the business of distributor and retail dealer of gasoline within the State of Missisippi, and as such distributor and retailer under and by virtue of the provisions of Chaper 119 of the Laws of 1926, became liable to the State of Mississippi in the sum of Four cents per gallon upon each and every gallon of gasoline sold by said distributor or retail dealer within the State of Mississippi in due course of business, which was not sold to retail dealers or other persons required by

law to pay said excise tax of four cents per gallon for the privilege of engaging in the business of distributor or retail dealer of gasoline, and that as such distributor and retail dealer of gasoline, the said defendant was required to report to the Auditor of Public Accounts all sales of gasoline upon which the said excise tax was due to be paid, and to pay thereon for the privilege of engaging in the business of distributor and retailer dealer of gasoline the sum of four cents per gallon on each and every gallon of gasoline sold in the State of Mississippi which was sold to a retail dealer who was required by law to pay said excise tax as provided in Chapter 119 of the Laws of 1926, Chapter 115 of the Laws of 1924 and Chapter 116 of the Laws of 1922.

The relator further shows to the court that from the first [fol. 7] day of April, 1926, to the first day of October, 1927, there was sold by said defendant within the State of Mississippi, 2,391,212 gallons of gasoline, which was sold in the regular course of business and was not sold to a retail dealer or other person liable to pay said tax, and that because of the sale thereof the said defendant became indebted to the State of Mississippi in the sum of $95,648.48, and paid to the State of Mississippi thereon the sum of $73,096.30 leaving a balance due of $22,552.18, and that although frequent demands have been made on the said defendant for the payment thereof, no part thereof has been paid by the said defendant or any other person or corporation, and that no other person, corporation or association is liable for said tax, and because of the failure and refusal of said defendant to pay said sums when due, the said defendant became and is liable for a penalty of five per cent of the total amount now due, amounting to $1,127.60 and six per cent interest per annum thereon from the date said payments should have been made as provided by law, making a total amount to the first day of November, 1927 of $24,784.28 with legal interest thereon from the 1st day of November, 1927 until paid.

Relator further shows to the court that the said defendant is continuing to carry on the business of retailing gasoline as a distributor and as a retail dealer of gasoline in the County of Harrison, State of Mississippi, without paying the full amount of the excise tax required by law, and

thereby the State of Mississippi has been and is now and will continue to be defrauded out of large sums of money unless the said defendant The Superior Oil Company, its agents, servants and employees be restrained by this Honorable Court from further distributing or selling gasoline, the sale of which is taxable in the State of Mississippi, until it shall have paid the excise tax, damages and interest now due, and has otherwise fully complied with the law pertain-
[fol. 8] ing to the sale and distribution of gasoline in the State of Mississippi. Relator is informed and believes that the said defendant is insolvent and that it has not sufficient available assets to satisfy its indebtedness.

Therefore, the prayer of your relator is that all proper process of this Court issue restraining and enjoining the said Superior Oil Company, its agents, employees and servants from further selling or distributing gasoline, the sale of which is taxable in the State of Mississippi, until it shall have paid the excise tax, damages and interest now due, and has otherwise fully complied with the law pertaining to the sale of gasoline in the State of Mississippi.

Relator further prays that upon a final hearing of this cause that a decree be entered against the Superior Oil Company in the sum of $28,196.28 with six per cent interest thereon from the 1st day of November, 1927, until paid, and for such other, further and more general relief as to the Court may seem just and proper, and in duty bound he will ever pray, etc.

Rush H. Knox, Attorney General, by E. C. Sharp, Attorney for Plaintiff.

Duly sworn to by Rush H. Knox. Jurat omitted in printing.

[fol. 9] In Chancery Court of Harrison County

[Title omitted]

Answer—Filed Jan. 16, 1928

Now comes the Defendant and for answer to the Bill of Complaint exhibited against it or to such parts thereof as

it is advised it is necessary and proper to answer, answering says:

Defendant admits that Rush H. Knox is the duly elected and qualified Attorney General of the State of Mississippi, and that the Superior Oil Company is a corporation organized under the laws of the State of Mississippi, domiciled at Biloxi, Harrison County, Mississippi.

Defendant admits that it is now, and has been for a long time prior to the filing of the bill of complaint, a distributor as well as a retail dealer in gasoline in Harrison County Mississippi, and that as such distributor it is engaged in the sale of gasoline to retail dealers in the State of Mississippi, and is a retailer of gasoline, but denies that it sold the gasoline specifically described in the exhibit to the bill of complaint marked "A" within the State of Mississippi and subject to the said excise tax.

Defendant further admits that on the 1st day of November, 1927, and for a long time prior thereto, defendant was and continuously since that time has been engaged in the business as a distributor and as a retail dealer of gasoline in the State of Mississippi, but denies that as such distributor and retail dealer it was by the provisions of Chap- [fol. 10] ter 116 of the Laws of 1922 required to report on or before the 20th day of each month to the Auditor of Public Accounts for all sales of gasoline made within the State, or that as a distributor of gasoline and retail dealer thereof it was required to render to the Auditor of Public Accounts on forms prescribed by such Auditor a true and correct statement of all gasoline sold by such retail dealer during the preceding month liable to the excise tax to be paid and to *to* show on such statement of the total number of gallons of gasoline sold by it and the name of the distributor or distributors by whom such gasoline was purchased, or that it was in any wise required to make the statement set out by the complainant in the bill of complaint.

Defendant denies that it was a distributor or retail dealer in gasoline required to pay for the privilege of engaging in said business an excise tax of three cents per gallon upon the sales of all gasoline in this State as alleged by the complainant in the bill of complaint.

Further answering said bill of complaint, defendant admits that the Superior Oil Company made and filed certain

statements with the Auditor of Public Acounts, and asserts the statement made therein are true, but not knowing what statement is referred to by the complainant in the bill of complaint and not being able to understand from the loose manner in which this paragraph of the bill of complaint is written exactly what the complainant is referring to denies any liability for tax due thereon.

Defendant denies that it made the statements set out in the bill of complaint or that it made any statement admitting the sale of any gasoline on which there was a tax due without having paid in the manner provided by law all taxes that was due upon gasoline reported by it as having been sold in the State of Mississippi and on which there was a tax due.

[fol. 11] Defendant further denies that because of any failure of it to pay any sum by it as charged by the bill of complaint that it became liable for $151.01 as set out in the bill of complaint, or for the sum of $3,020.22, or any sum whatsoever. And further answering said paragraph, defendant denies that it is indebted to the State of Mississippi for any sum whatwoever, specially denying it was indebted in the amount and manner set out in the paragraph herein answered.

Defendant admits that on the 1st day of April, 1926, and since said time, it has been engaged as a distributor and retail dealer of gasoline in the State of Mississippi, but denies that as such under and by virtue of Chapter 119 of the Laws of 1926 it became liable to the State in the sum of four cents per gal-ong on each and every gallon of gasoline sold by it in the State of Mississippi, which was not sold to retail dealers or other persons required by law to pay said tax of four cents per gallon, or that as such distributor or retail dealer the defendant was required to report to the Auditor of Public Accounts all sales of gasoline made by it and to pay thereon for the privilege of engaging in the business of distributor and retail dealer of gasoline the sum of four cents on each and every gallon of gasoline sold in the State of Mississippi.

The defendant denies that from the 1st day of April, 1926, to the 1st day of October, 1927, there was sold by the defendant in the State of Mississippi, 2,391,312 gallong of gasoline, which was sold in the regular course of business

and was not sold to a retail dealer or dealer liable to pay the tax on gasoline, and the defendant denies that because of the sale thereof this defendant became indebted to the State of Mississippi in the sum set out in the bill of complaint, and specially denies that it was and is now indebted to the State of Mississippi in the sum of $22,522.18 or any sum whatever.

[fol. 12] Defendant further denies that because of its failure to pay the said tax demanded of it it became indebted to a penalty of $1,127.60 or any interest whatever on said sum, and specially denies that it was liable to the State for any taxes on gasoline whatever.

Defendant admits that it is attempting to carry on the business of retailing gasoline as a distributor and retail dealer in the County of Harrison, but denies that it is doing so without paying all of the taxes required of it by law, or that the State of Mississippi has been, is now, and will continue to be defrauded of any sum, and specially the sum stated in the bill of complaint, unless the defendant and its agents and servants be further restrained from selling gasoline, the sale of which is taxable in the State of Mississippi, until it pays the tax mentioned and described in the bill of complaint.

Defendant further answering said paragraph, specially denies that it is insolvent, averring the fact to be that the defendant at the time of the filing of the bill of complaint had assets in excess of the sum of $140,000.00.

And now having answered said bill of complaint as far as the same can be answered by the defendant, this defendant further answering said bill of complaint, to be taken as a plea in bar of the relief sought in said bill, respectfully shows unto the Court as follows:

That the defendant is a distributor and retail dealer in gasoline, domiciled at Biloxi, Mississippi, and as such distributor and retail dealer in gasoline sells gasoline both for domestic consumption and for export beyond the limits of the State of Mississippi.

That situated in Biloxi are a large number of canning interests who have found it necessary to use large quanti-[fol. 13] ties of gasoline in the States of Louisiana and Alabama for propelling boats used therein for catching oysters and shrimp. That various persons engaged in this business

secured from the defendant an agreement to furnish them all gasoline consumed or sold by them in the State of Louisiana, and this gasoline was furnished in the following manner:

After the order for said gasoline had been given to the defendant, the defendant would then in excess of all their domestic gasoline used by it, order the shipment of certain cars from points in Texas, Louisiana, or Arkansas, which gasoline, after its arrival in Biloxi, Mississippi, would be by the defendant placed in a storage tank and withdrawn thereafter in fifty gallon iron varrels and shipped by means of a freight boat, this being the only manner of transportation to the fishing district of Louisiana, to various points in the Louisiana marsh; who thereupon used or sold said gasoline to boats fishing in Louisiana, consigned to the purchaser of gasoline, and by means of said common carrier would make delivery of said shipment to said purchaser in Louisiana. A form of the bill of lading in such transportation being hereto attached to this answer and marked Exhibit "A" and prayed to be taken as a part hereof.

That by reason of said manner and method of the sale of gasoline in export or Interstate Commerce the defendant was wholly excepted from payment of any privilege tax due on gasoline, this exception being granted by Section 3 of the Laws of 1926, being Chapter 119, which law is as follows:

"Not Applicable in Certain Cases. This act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this State to another State or Nation, nor to require the inclusion in the [fol. 14] measure of tax any gasoline shipped in Interstate Commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another State or person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this State. Provided, that distributors making shipments of gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the State Auditor of Public Accounts."

That all gasoline for which a tax is demanded by the complainant in the bill of complaint herein was sold in Interstate Commerce or for export in the manner set out and fully described herein, and for this reason the defendant is not indebted to the complainant for any sum whatever.

And further answering said bill of complaint and as a plea thereto, defendant would show unto the Court that as a retail and wholesale distributor of gasoline in Mississippi it has been its custom and method of doing business to receive certain orders for gasoline in large quantities from persons who were engaged in the packing of oysters and shrimp in Biloxi, Mississippi, and who had need of large quantities of gasoline for furnishing power to their boats used by said packers in the marshes of Louisiana in the catching of shrimp and oysters.

That this defendant would agree to furnish all the gasoline consumed by said packers in Louisiana and Alabama, and to supply gasoline to boats in Louisiana and Alabama furnishing oysters and shrimp to said packers, and would agree to deliver same by any convenient carrier to any designated point in Louisiana and Alabama. After getting [fol. 15] said orders for gasoline said defendant, in addition to all gasoline sufficient to furnish its domestic requirements in Mississippi, would order from points in Louisiana, Arkansas and Texas sundry and various carloads of gasoline to be used by it to furnish orders for said export or Interstate business, which gasoline after its arrival in Biloxi, would be stored in storage tanks in bulk and thereafter drawn out in fifty gallon barrels, which barrels would be marked and accompanied by bill of lading and delivered to a freight boat, this being the only convenient manner of transportation, consigned to various persons at various points in Louisiana and Alabama, and by said freight boat, as agent of the defendant, would be delivered to the designated points in Louisiana and Alabama, and was there used or sold by them to boats engaged in fishing on said waters. A copy of the bill of lading commonly used by the defendant in making said deliveries being attached hereto and made a part of this answer and marked Exhibit A hereto.

That the law of Mississippi governing the sale of gasoline as prescribed by Section 1, 2 and 3, Chapter 119 of the Laws of 1926, is as follows:

"Privilege Tax on Gasoline. Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4c.) per gallon upon the sale of gasoline by such dealer in this State. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer."

"Tax Imposed on Use of Same. There is hereby imposed upon the use of gasoline by each person in motor-driven vehicles upon the public roads and streets of this State, an excise tax of four cents (4c.) per gallon on such gasoline [fol. 16] so used, where no tax on the distribution thereof has been paid or is required to be paid by the distributor, retailer or importer. A distributor or retail dealer, of gasoline shall include in his report to the State Auditor of Public accounts all such gasoline used in his own business on the public roads and streets of this State, and shall pay said tax thereon; provided, however, the tax imposed by Section 1 of this Act has not theretofore been paid thereon. Likewise, importers or other persons using gasoline in motor-driven vehicles upon the public roads and streets of this State shall make such report in the same manner and pay the tax on the above rate as is required to be paid by persons engaged in the business of distributing gasoline; provided however, the tax imposed by Section 1 of this Act has not theretofore been or is required to be paid by the distributor or retailer from whom the said gasoline was purchased. The purpose and intent of this section is to require the payment of said tax by persons who purchase, or otherwise obtain, gasoline for use in motor-driven vehicles upon the public roads of this State, from any source other then distributors or retailers who are required to pay the tax imposed by Section 1 of this Act."

"Not Applicable in Certain Case. This Act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this State to another State or Nation, nor to require the inclusion in the measure of tax any gasoline shipped in Interstate Commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another State or

person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this State. Provided, that distributors mak- [fol. 17] ing shipments of gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the State Auditor of Public Accounts."

And which laws if it in any manner seeks to tax or if it is the purpose of the said laws to tax sales of gasoline made for export or Interstate Commerce as hereinabove set forth, is illegal, invalid, null and void as a burden upon Interstate Commerce, in direct conflict with Clause 3 of Paragraph 8 Article 1 of the Constitution of the United States, which Provides that Congress shall have power "To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and would be further void if it attempted to levy a tax upon one article exported from the State of Mississippi, because it would be in direct conflict with Article 14 of the Constitution of the United States, which provides, among other things "Nor deny to any person within its jurisdiction the equal protection of the laws."

That said Act if enforced in the manner sought by the complainant in this case would deny to the Superior Oil Company the protection given by the State of Mississippi to all other persons engaged in commerce of its laws without the necessity of any sales tax being laid upon its business except as a privilege for doing a certain purpose, which this Company pays in the same manner as to the same extent that all other privileges are paid in the State of Mississippi, and would be further void as laying a duty on exports, because of clause 5, Section 9, Article 1 of the Constitution of the United States.

This defendant would here show that at all times it has in good faith endeavored to comply with the laws of this [fol. 18] State with reference to the sale of gasoline and that it has complied with the same by paying to the State the full amount of taxes as required by law. That at the beginning of its operations it discussed the matter — compli-

ance with the then Attorney General of this State and received his sanction and approval of the course that has at all times since been followed by it. That at all times it made a full, accurate and true report to the Auditor of the State of Mississippi, as required by the law and the said Auditor, and such reports show in detail the total amount of gasoline sold by it, the amount on which said excise tax is due, the gallonage of gasoline sold in Interstate Commerce upon which no tax was due, and that full payments were made thereon.

And now having fully answered said bill of complaint the defendant prays that the same may be dismissed and it discharged therefrom with its reasonable cost.

Superior Oil Company, by John J. Kennedy, President.

Duly sworn to by John J. Kennedy. Jurat omitted in printing.

[fol. 19] EXHIBIT "A" TO ANSWER

No. 4882. Biloxi, Miss., 12/20, 1927.

Received, in good order and condition, from Superior Oil Company, Biloxi, Miss.:

No. pieces	Description of articles	Weight
2	Drums Gasoline	.....

Consigned to Gussie Fountain Pkg. Co. Destination: Grants Pass, La. By Boat Frank Louis. Owned or Operated by Gussie Fountain Pkg. Co. The Master of said Boat Frank Louis acknowledges receipt of said goods and agrees to deliver merchandise as consigned in like good order and condition.

It is further understood and agreed that the property consigned hereon remains the property of the said Superior Oil Company until it shall be delivered to Consignee or Consignee's Agent at point of destination but that all due caution and carefulness will be exercised by Master and crew of said Boat Frank Louis to protect said property and effect a safe delivery without undue delay.

In consideration of the packet rate charged for carrying property described hereon, the owners of this Boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit caused by carelessness or negligence, this damage and loss shall be sustained by owners of Boat accepting this shipment.

366-537.

(Signed) Joseph Adams, Master of Boat Frank Louis.

Received $— collect to apply in prepayment of packet charges, on property hereon described, from Biloxi, Miss., to Grants Pass, La.

—— ——, for Master of Boat.

[fol. 20] Form M, No. A-6420
Gasoline Superior Motor Oil

Biloxi, Miss., December 20, 1927.

Gussie Fountain Company, Grants Pass, La.; Superior Oil Company (Incorporation in Mississippi)

	Pounds or gallons	Price	Amount	Total
Gasoline, "Frank Lewis" Truck 6 #1486.	110	12½	13 75	13 75

Superior Oil Company

Incorporated in Mississippi

Truck 6. No. 1486

Biloxi, Miss., 12/20, 1927.

Sold to Gussie Fountain Pkg. Co., Grants Pass., La., Boat Frank Louis and Owners

Drum	Kind	Pounds or gallons	Price	Amount	Total
366 537	Gasoline	110	12½	13.75	.....

Received payment. By —— ——.
Received in good order. By Joseph Adams, purchaser.

[File endorsement omitted.]

[fol. 21] In Chancery Court of Harrison County

[Title omitted]

Amendment to Answer—Filed Febr. 7, 1928

Amendment to the answer in this cause, made pursuant to agreement of counsel and order of the court, by inserting, after the last word on page 7 thereof, the following:

That the law of Mississippi governing the sale of gasoline as prescribed by Sections 1 and 2, Chapter 116, of the Laws of 1922, were as follows:

"Section 1. Be it enacted by the Legislature of the State of Mississippi:

Definitions

As used in this act the word 'Gasoline' means:

Word 'Gasoline' Defined

(a) The volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of gasoline.

(b) Any volatile substance or products of not less than 46% Tagliaubes Baume Test sold or used for motive power for propelling motor vehicles.

Word 'Person' Defined

The word 'person' means and includes every person, corporation, co-partnership, company, agency or association. The distribution of gasoline means a person engaged in the sale of gasoline in any manner not commonly known as retail, but shall not include any person engaged in selling gasoline in whole or in part in interstate commerce.

Retail Dealer Defined

[fol. 22] The term 'retail dealer' includes any person engaged in the sale of gasoline from any place in this State, and delivered to the purchaser thereof in broken quantities.

Excise Tax on Dealers

"Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1c. per gallon upon the sale of gasoline by such dealer in this state, except however, such gasoline as is brought into this State and sold in original packages or otherwise in Interstate Commerce, or such as is purchased outside of the State and brought into this State in original packages or otherwise by the consumer for his own use, shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be re-sold at retail by such dealer. Nor shall the distributor pay such tax when the same is paid by the retailer."

That Section 2 of the said Chapter 116, of the Laws of 1922, was amended by Chapter 115, Laws of 1924, so as to read as follows:

Sec. 2. Any person engaged in business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of three (3c.) per gallon upon the sale of gasoline by such dealer in this State, except, however, such gasoline as is brought into this State and sold in original packages or otherwise in interstate commerce, or such as is purchased outside of the State and brought into this State in original packages, or otherwise by the consumer for his own use shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer.

[fol. 23] Not Applicable in Certain Cases

However, the tax herein imposed shall not apply to gasoline purchased by the State or any County, municipality or tax paying district of the State for use in the construction, maintenance or repair of public improvements."

That Section 2, of Chapter 115, of the Laws of Mississippi of 1924, were amended by Chapter 119 of the Laws of Mississippi of 1926.

W. L. Guice, Jno. L. Heiss, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 24] In Chancery Court of Harrison County

Statement of Evidence

Stipulation as to Exhibit

By Mr. Sharp: In order to save the necessity of having the State Auditor appear at this Court with voluminous records, it is agreed that the papers here marked Exhibit "A" are true and exact copies of the reports made by the Superior Oil Company to the Auditors of Public Accounts, showing the amount of gasoline sold by Superior Oil Company during the time embraced in this law suit, both as to quantity sold to local people upon which the tax was due and paid, and showing also the quantity claimed by the defendant to have been shipped to other States, and that this statement is admitted in evidence as if it were the original, the original of which said statement being sworn to by F. B. Royster, as manager of the Superior Oil Company.

[fol. 25] Exhibit "A"

Distributor's Report, January, 1926

Mississippi Sales		
Total Gallonage for January		64,589
Company's Use	534	
Shipped to La., Grants Pass, La.:		
Elmer Packing Co	55	
Latimer Pkg. Co	110	
Anticich Packing Co	330	

Biloxi Canning Co	110	
Deer Island F. & O. Co	3,245	
Desporte Pkg. Co	660	
Henry Diaz	1,045	
Dunbar Dukate Co	1,485	
De Jean Packing Co	330	
C. B. Foster Co	1,265	
Foster Fountain Co	1,980	
Gussie Fountain Co	1,045	
Gulf City Pkg. Co	660	
Martin Fountain Co	880	
Johnson Canning Company	220	
Peter Quave	1,320	
Sea Food Company	605	
Wentzell Brothers	220	
P. Williams	3,630	
	19,195	
Company's Use	534	
Harrison County	1,095	
		20,825
Total for tax		43,764

[fol. 26] Special Harrison County Tax

January, 1926

Total	38,726
Company Use	534
Total for Tax	38,192

Distributor's Report, February, 1926

Mississippi Sales		75,000
Company's Use		452
Total gas used by company		75,452
Shipped to Louisiana, Grants Pass, La.:		
George Mallett	55	
Nick Skermetti	110	

Elmer Pkg. Co	330
De Jean Pkg. Co	275
Latimer Pkg. Co	55
Desporte Pkg. Co	550
Peter Quave	1,045
Wentzell Brothers	220
Gulf City Pkg. Co	440
Gussie Fountain Co	1,540
C. B. Foster Co	825
Deer Island F. & O. Co.	4,400
Dunbar Dukate Co	1,980
Martin Fountain Co	1,265
Johnson Pkg. Co	55
P. Williams	7,645
W. B. Skinner	55
Anticich Pkg. Co	1,595
Foster Fountain Co	2,255
Sea Food Company	605
[fol. 27] Henry Diaz	2,365
Alfred Bourgeous	55
Total shipped	27,720

Harrison County, February, 1926

Brought Forward		75,452
Shipped to La		
Harrison County	27,720	
Company's Use	958	
	452	
Total to be deducted		28,130
Total for 3¢ tax		46,322
Harrison County 2¢ Tax for Month		
Harrison County		41,319
Company's Use	958	
	452	
Total to be deducted		1,410
Total for tax		39,909

[fol. 28] Distributor's Report, March, 1926

Mississippi sales		87,475
Company's Use	592	
Shipped out of State, Grants Pass, La:		
Wentzell Bros.	55	
Elmer Pkg. Co	660	
Sea Food Co	660	
Alfred Bourgeois	110	
Charles Ross	110	
John Casavovich	110	
Biloxi Canning Co	55	
Jim Parker	55	
De Jean Pkg. Co	440	
Desporte Pkdg. Co	715	
C. B. Foster Pkg. Co	990	
Anticich Pkg. Co	2,365	
Kennedy Pkg. Co	110	
Biloxi Fishermen Pkg. Co	165	
Henry Diaz	2,695	
Dunbar Dukate Co	1,980	
Johnson Pkg. Co	935	
Gussie Fountain Co	2,365	
Peter Quave	935	
Gulf City Pkg. Co	385	
Deer Island F. & O. Co	6,160	
Martin Fountain Pkg. Co	1,650	
Foster Fountain Co	2,035	
P. Williams	8,085	
	33,835	
Harrison County	980	
Company Use	632	
[fol. 29] Total to be deducted		35,437
Total for tax		52,630
Special Harrison county tax		48,410
Harrison County	980	
Company's Use	632	
Deducted		1,612
Total for tax		46,798

Distributor's Report, April, 1926

Mississippi Sales (including Co. use)		79,987
Shipped to Louisiana, Grants Pass:		
Kennedy Pkg. Co	385	
Henry Diaz	1,980	
Deer Island F. & O. Co	4,400	
Gulf City Pkg. Co	495	
Johnson Canning Co	1,375	
Phillip Williams	275	
De Silvrey Pkg. Co	55	
Capt. Joe Kriss	55	
Dunbar Dukate Co	1,980	
Gussie Fountain Co	1,485	
Anticich Pkg. Co	3,025	
C. B. Foster Pkg. Co	495	
Sea Food Co	825	
Desporte Pkg. Co	715	
Biloxi Fishermen Pkg. Co.	165	
Martin Fountain Co	1,210	
Foster Fountain Co.	1,590	
De Jean Pkg. Co.	440	
P. Williams	6,490	
[fol. 30] Peter Lessa	55	
Total to be deducted		27,495
Total for tax		52,492
Special Harrison County tax		47,645

Distributor's Report, May, 1926

Mississippi Sales (including company use)		67,356
Shipped to Louisiana, Grants Pass:		
Biloxi Fishermen Pkg. Co	110	
Johnson Canning Co	165	
Henry Diaz	220	
Phillip Williams	990	
Joseph Kriss	55	
C. B. Foster Pkg. Co	55	
Martin Fountain Pkg. Co	605	
Foster Fountain Co	220	
Desporte Pkg. Co	110	
Gulf City Pkg. Co	55	

Sanitary Fish & O. Co	330	
Sea Food Co	55	
Deer Island F. & O. Co	3,080	
P. Williams	495	
Amount to be deducted		6,545
Total for tax		60,811

[fol. 31] Distributor's Report, June, 1926

Mississippi Sales (including company use)		69,196
Shipped to Louisiana, Grants Pass:		
Biloxi Fishermen Pkg. Co.	55	
Alfred Bourgeois	55	
Sanitary Fish & Oyster Co	220	
Gussie Fountain Co	55	
C. B. Foster Pkg. Co.	220	
Dunbar Dukate Co	165	
Deer Island F. & O. Co	3,300	
Foster Fountain Co	1,430	
Desporte Pkg. Co	55	
Gulf City Pkg. Co	55	
Henry Diaz	550	
		6,160
Total for tax		63,036
Special Harrison County tax		59,000

[fol. 32] Distributor's Report, July, 1926

Mississippi Sales (including company use)		90,495
Shipped to Louisiana, Grants Pass:		
Biloxi Canning Co.	55	
C. B. Foster Pkg. Co.	495	
Henry Diaz	165	
Foster Fountain Pkg. Co.	1,760	
Dunbar Dukate Co.	110	
P. Williams	330	
Deer Island F. & O. Co.	4,675	
Sanitary Fish & O. Co.	385	
Desporte Pkg. Co.	55	8,030
Total for tax		82,465
Special Harrison County tax		75,297

[fol. 33] Distributor's Report, August, 1926

Mississippi sales (including company use)		107,575
Shipped to Louisiana, Grants Pass:		
Dunbar Dukate Co.	4,675	
C. B. Foster Pkg. Co.	2,090	
Sea Food Co.	2,970	
Henry Diaz	2,805	
Gussie Fountain Co.	3,730	
Anticich Pkg. Co.	1,837	
Peter Quave	770	
Phillip Williams	550	
Foster Fountain Co.	4,785	
Desporte Pkg. Co.	1,705	
DeJean Pkg. Co.	495	
Deer Island F. & O. Co.	3,850	
C. C. Company	55	
Luka Kuljis	3,025	
Sanitary F. & O. Co.	825	
Johnson Canning Co.	1,925	
P. Williams	4,895	40,997
Total gallonage for tax		66,578
Special Harrison County tax		60,834

[fol. 34] Distributor's Report, September, 1926

Mississippi Sales (including company use)		106,535
Shipped to Louisiana, Grants Pass:		
C. B. Foster Co.	2,585	
Luka Kuljis	3,575	
Desporte Packing Co.	1,870	
Gussie Fountain Co.	4,950	
Henry Diaz	2,365	
Johnson Canning Co.	1,650	
Anticich Pkg. Co.	2,365	
Dunvar Dukate Co.	3,520	
P. Williams	5,555	
Sanitary F. & O. Co.	2,035	
Peter Quave	1,045	
Sea Food Co.	3,245	
Foster Fountain Co.	4,290	
Deer Island F. & O. Co.	3,300	

Paul Newman	55	
Philip Williams	330	
E. C. Joullian	440	
DeJean Pkg. Co.	330	
Watts Engineering Co.	55	
Total shipped		43,560
Total for tax		62,975
Special Harrison County 2¢ tax		56,876

[fol. 35] Distributor's Report, October, 1926

Mississippi sales (including company use)		118,329
Shipped to Louisiana, Grants Pass:		
Luka Kuljis	3,850	
Gussie Fountain Co.	5,500	
Anticich Pkg. Co.	2,365	
Peter Quave	990	
Henry Diaz	3,300	
E. C. Joullian Co.	935	
Sanitary F. & O. Co.	2,365	
Deer Island F. & O. Co.	5,885	
Sea Food Co.	2,750	
Desporte Pkg. Co.	3,135	
P. Williams	7,040	
C. B. Foster Pkg. Co.	3,300	
Foster Fountain Co.	5,830	
Philip Williams	605	
Dunbar Dukate Co.	5,280	
Gulf City Pkg. Co.	495	
DeJean Pkg. Co.	275	
Johnson Pkg. Co.	2,255	
Laz Quave	55	
Dubaz Brothers	55	
Total shipped to be deducted		56,265
Total for tax		62,064
Special Harrison County 2¢ tax		53,942

[fol. 36] Distributor's Report, November, 1926

Mississippi sales (including company use)		115,397
Shipped to Louisiana, Grants Pass:		
Gulf City Pkg. Co.	440	
Sanitary F. & O. Co.	2,090	
E. C. Joullian Pkg. Co.	1,265	
Anticich Pkg. Co.	1,045	
Henry Diaz	1,375	
De Jean Pkg. Co.	495	
Peter Quave	330	
Laz Quave	55	
Dubaz Brothers	110	
W. W. Balter	275	
Deer Island F. & O. Co.	4,840	
Luka Kuljis	5,225	
Sea Food Co.	2,915	
Gussie Fountain Co.	3,795	
Philip Williams	220	
Gus Swain	110	
Desporte Pkg. Co.	1,430	
Foster Fountain Co.	2,695	
Dunbar Dukate Co.	5,555	
Brought forward		115,397
Johnson Canning Co. Grants Pass, La.	3,300	
C. B. Foster Pkg. Co.	2,640	
P. Williams	7,205	
P. Williams, Bayou La Batre, Ala.	330	
Total shipped		47,740
Total for 4¢ tax		67,657
Special Harrison County tax		57,611

[fol. 37] Distributor's Report, December, 1926

Mississippi sales (including company use)		100,515
Shipped to Louisiana, v. Grants Pass:		
Walter Baltar	2145	
Peter Quave	110	
Sea Food Company	1,540	
Dunbar Dukate Co.	1,815	

P. Williams	3,410	
Henry Dias	1,485	
Luka Kuljiz	3,565	
C. B. Foster Pkg. Co.	1,045	
Gussie Fountain Co.	2,750	
Foster Fountain Co.	1,870	
Sanitary F. & O. Co.	1,760	
Anticich Pkg. Co.	1,595	
Johnson Canning Co.	2,420	
Desporte Pkg. Co.	1,265	
Gus Swain	55	
De Jean Pkg. Co.	220	
Gulf City Pkg. Co	275	
E. C. Joullian Pkg. Co	770	
Deer S. Island F. & O. Co.	2,915	
Biloxi Fishermen's Pkg. Co.	55	
R. J. Quave	55	
		31,120
Total for 4¢ tax		69,395
Harrison county 2¢ tax		66,036

[fol. 38] Distributor's Report, January, 1927

Mississippi sales (including company use)		101,252
Shipped to Louisiana, Grants Pass:		
Biloxi Fishermens Pkg. Co.	55	
Anticich Packing Co.	660	
W. W. Baltar	2,420	
Henry Diaz	1,155	
Deer Island F. & O. Co.	1,650	
Desporte Pkg. Co.	715	
De Jean Pkg. Co.	385	
Dunbar Dukate Co.	2,475	
Foster Fountain Co	1,155	
C. B. Foster Co	275	
Gussie Fountain Co.	1,870	
E. C. Joullian Pkg. Co.	1,100	
Johnson Canning Co.	1,375	
Luka Kuljis	3,575	
R. J. Quave	55	
Peter Quave	55	
Sanitary F. & O. Co.	1,375	

Sea Food Co.	495	
P. Williams	2,530	
W. W. Baltar	55	
Total shipped out of State		23,430
Amount of 4¢ tax		77,822
Special Harrison County tax		73,919

[fol. 39] Distributor's Report, February, 1927

Mississippi sales (including company use)		110,574
Shipped to Louisiana & Alabama:		
Johnson Can. Co., Grants Pass, La.	660	
Luka Kuljis,	4,950	
Foster Fountain Co.,	1,000	
Anticich Packing Co.,	990	
C. B. Foster Pkg. Co.,	385	
Desporte Pkg. Co.,	660	
De Jean Pkg. Co.,	330	
Dunbar Dukate Co.,	2,090	
P. Williams,	1,870	
Sanitary F. & O. Co.,	990	
Gussie Fountain Co.,	2,805	
Deer Island F. & O. Co.,	1,705	
Henry Diaz,	825	
Philip Williams,	660	
C. E. Joullian Co.,	1,100	
See Food Co.,	550	
Peter Quave,	55	
Bayou La Batre Wharf Sta. Bayou, La., Batre, Ala.	7,005	
W. W. Baltar, Grants Pass, La.	2,475	
Total shipped to La. & Ala.		31,205
Total for tax		79,369
Special Harrison County tax 2¢		74,910

[fol. 40] Distributor's Report, March ,1927

Mississippi Sales (including company use)		119,752
Shipped to Louisiana, Grants Pass:		
W. W. Balter	1,540	
Gussie Fountain Co	2,530	
Deer Island F. & O. Co	2,640	
P. Williams	2,090	
Biloxi Fishermen's Pkg. Co	55	
Sea Food Co	990	
Sanitary F. & O. Co	1,485	
E. C. Joullian Co	605	
De Jean Pkg. Co	220	
Henry Diaz	605	
Anticich Pkg. Co.	2,420	
Dunbar Dukate Co	2,970	
Desporte Pkg. Co	880	
Foster Fountain Co	1,155	
Luka Kuljis	4,290	
Johnson Can Co	2,475	
C. B. Foster Co	880	
Peter Quave	110	
Laz Quave	55	
Martin Fountan Co.	220	
Bayou La Batre, Bayou La Batre, Ala.	936	
Philip Williams, Grants Pass, La	165	
Total shipped out of State		29,316
Total gallonage for 4¢ tax		90,436
Special 2¢ Harrison County tax		86,037

[fol. 41] Distributor's Report, April, 1927

Mississippi Sales (including company use)		134,492
Shipped to Bayou La Matre, Ala	2,584	
Shipped to Louisiana	21,120	
Total gallonage shipped		23,704
Total gallonage for 4¢ tax		110,788
Special Harrison County 2¢ tax		107,988

Distributor's Report, May, 1927

Mississippi sales		99,873
Out State deliveries:		
Bayou La Batre, Ala.	1,503	
Grants Pass, La	15,565	
		17,068
Total gallonage for 4¢ tax		82,805
Special Harrison County tax, 2¢		79,064

[fol. 42] Distributor's Report, June, 1927

Mississippi Sales (including company use)		104,993
Out of State deliveries:		
Grants Pass, La	19,799	
Grand Bay, Ala	110	
Bayou La Batre, Ala	3,025	
		22,934
Total amount for 4¢ tax		82,059
Harrison County 2¢ tax		77,615

Distributor's Report, July, 1927

Mississippi Sales (including company use)		96,513
Out of State deliveries:		
Grants Pass, La	8,855	
Bayou La Batre, Ala	2,336	
Lockport, La.	110	
		11,301
Total for tax		85,212
Special Harrison County tax		78,526

[fol. 43] Distributor's Report, August, 1927

Mississippi sales		112,800
Out State deliveries:		
Grants Pass, La	25,520	
Bayou La Batre, Ala	6,907	
Fosters Canal, La	5,500	
		37,927
Total for tax		74,873
Harrison County special tax (including Co. use)		68,927

Distributor's Report, September, 1927

Mississippi Sales (including Co. use)		110,062
Out State deliveries:		
Grants Pass, La	47,795	
Bayou La Batre, Ala	605	
		48,400
Total for tax		61,662
Harrison County special tax		57,599

Distributor's Report, October, 1927

Mississippi Sales (including Co. use)		110,309
Out State deliveries:		
Grants Pass, La	54,395	
Bayou La Batre, Ala	935	
		55,330
Total for tax		54,979
Special Harrison County tax		50,847

[fol. 44] Distributor's Report, November, 1927

Mississippi Sales (including Co. use)		114,915
Out State deliveries:		
Grant Pass, La	59,070	
Bayou La Batre, Ala	1,650	
Mobile, Ala.	110	
		60,830
Total for tax		54,085
Special Harrison County tax		48,135

Distributor's Report, December, 1927

Mississippi Sales		81.514
Out State deliveries:		
Grants Pass, La	25,190	
Bayou La Batre, Ala	2,255	
		27,445
Total for tax		54,069
Special Harrison County tax		47,905

[fol. 45] F. B. ROYSTER, a witness for complainant, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Sharp:

Q. Mr. Royster, what official position, if any, do you occupy with the Superior Oil Company, the defendant in this suit?

A. I am manager of the Superior Oil Company.

Q. How long have you been manager?

A. Since it was organized.

Q. When was it organized?

A. January, four years ago.

Q. As such manager, you have been in charge of the concern since that time?

A. Yes.

Q. Where is that company located?

A. At Caillavet and Railroad, Biloxi, Mississippi.

Q. You have the customary large storage tanks from which you unload gasoline from cars?

A. Yes.

Q. How many tanks have You?

A. Two gasoline tanks.

Q. Dow do you use them—just keep each one filled as near as you can?

A. No.

Q. Explain how you use them?

A. Our demand for gasoline that is used in automobiles is rather constant. We know a month ahead approximately the amount we will use for automobiles, and that on which we pay tax. The gasoline that was used in shipment did fluctuate, high one month and relatively low the next month. We got our supplies to conform with the demand.

[fol. 46] Q. You used the two tanks for general purposes?

A. In one sense, yes, Yes, I say for general purposes.

Q. Gasoline is shipped in her from your wholesaler or distributor in other states?

A. From the refinery.

Q. In your reports here, I see that you have claimed for January, 1926, certain gasoline alleged to have been shipped to Grants Pass, through the Elmer Packing Company; that is a concern in Biloxi, is it not?

A. It was.

Q. At that time?

A. Yes.

Q. Now that gasoline was sold by your concern in Biloxi to the Elmer Packing Company, as shown by your report here?

A. Yes.

Q. And delivered to Elmer Packing Company's boat at your wharf there in Biloxi?

A. I don't know whether our wharf or his wharf. It was consigned to a point in Louisiana.

Q. For instance, we will take this first item "Elmer Packing Company, Grants Pass, Louisiana, "that was delivered in Biloxi, Harrison County, Mississippi, either at your wharf or his wharf?

A. It was delivered in sealed packages to him to deliver in Louisiana.

Q. That was drawn out of one of your large storage tanks and put in cask or drums and delivered to that wharf and charged to the Elmer Packing Company of Biloxi, Mississippi?

A. Yes.

Q. Do you know what boat that was delivered to?

A. That bill of lading shows what boat it was.

Q. In practically every instance, if not in every instance, [fol. 47] the shipment was delivered to Elmer and the other parties mentioned here, and shipped in boats owned or controlled by that concern, was it not?

A. The Captain of the boat signed a bill of lading agreeing to convey this barrel of gasoline to Elmer Packing Company at this point in Louisiana.

Q. But it was delivered to the boat owned by the party who owned the gasoline?

A. I don't know about that.

Q. Could you furnish us the various bills-of-lading?

A. We have copies of them all.

Q. Have you them with you?

A. No, sir; they are in Biloxi.

Counsel for complainant asks the defendant to furnish bills-of-lading for each shipment, to be furnished as soon as can be done, which the defendant agrees to do.

Q. Each and every shipment was handled in the same way, was it not?

A. Practically.

Q. Attached to your bill is a copy of a bill-of-lading dated 12/20/27, that is copy of the various former bills-of-lading used in other instances?

A. Yes.

Q. That shows you delivered two drums of gasoline, consigned to Gussie Fountain Packing Company, designation, Grants Pass Louisiana, by boat Frank Louis, owned and operated by Gussie Fountain Packing Company; that is customary bill-of-lading? That shipment was set out in your report as interstate commerce?

A. Yes.

Q. The Boat Frank Louis is registered as fishing boat in the proper office, and owned by Gussie Fountain Packing Company?

[fol. 48] A. I don't know.

Q. It was owned or controlled by Gussie Fountain Packing Company?

A. I don't know that.

Q. Your bill-of-lading shows that?

A. We delivered order to Gussie Fountain Packing Company, delivered abroad that boat. We have receipt showing captain of boat received it.

Q. It was owned by Gussie Fountain Packing Company, that boat?

A. Yes.

Q. It was a fishing boat?

A. The Gussie Fountain Packing Company said shipped on freight boat.

Q. You are familiar with the boat Frank Louis, are you?

A. No.

Q. You don't know if it is a fishing boat?

A. I don't.

Q. The bill of lading does not show freight paid, how do you arrive at that?

A. We make charges collect because operated by factory shipping out, and they assume freight charges, whatever they be.

Q. No freight charges paid by the Company?

A. Not on that particular shipment, but have prepaid lots.

Q. On what boats?

A. I don't recall, but lot to plant at Bayou La Batre; but we shipped by water to Bayou La Batre, and where sold there pay Alabama tax on it. Also on C. B. Foster, at Fosters Canal, Louisiana. We don't pay freight on that, they pay that.

Q. You pay Alabama tax in Alabama?

A. No.

Q. Paid in Louisiana?

[fol. 49] A. No, because we sell ourselves in Alabama, but in Louisiana we con't sell, they sell it. The factories sell it, or the captains of the boats sell it.

Q. You sell at this end and they sell in Louisiana?

A. I sell delivered in Louisiana.

Q. It is your property until delivered to consignee in Louisiana?

A. Yes.

Q. And it is consigned to Gussie Fountain Packing Company?

A. Yes.

Q. Your property until delivered to Gussie Fountain Packing Company?

A. Yes.

Q. How is it delivered at Grants Pass? From a station or depot?

A. There is a point there. All boats touch coming and going out in Louisiana, at Grants Pass.

Q. There is no freight facilities, agency or delivery point?

A. I have never been out there.

Q. In fact delivered to fishing boats out there?

A. Yes.

Q. And not to agent or station, or anyone else?

A. Not that I know.

Q. Where it is consigned to you, to whom is it delivered?

A. It is not consigned to us out there.

Q. In no instance consigned to you?

A. No.

Q. You deliver to Grants Pass to fishing boats?

A. By order of concern ordering it.

Q. You sell in Mississippi and not in Louisiana?

A. We sell delivered into Louisiana.

[fol. 50] Q. You sell here to deliver into Louisiana?

A. We deliver into Louisiana and charge for it; we have shipped into Louisiana, and it is our property until reached point in Louisiana.

Q. When do you charge to various consignees, after get notice of delivery?

A. We do not wait until we get notice of delivery into Louisiana, we charge when we get the order and it is shipped.

Q. Paid for by our local concerns?

A. Not necessarily. For instance in Dunbar-Dukate Company, we get out check from New Orleans.

Q. That is their principal office?

A. I presume so.

Q. They have packing in Biloxi you furnish gasoline to?

A. Yes.

Q. And all concerns named in this report, and individuals named in this report, are residents of Harrison County?

A. I don't know.

Q. Could you look it over and tell?

A. I cannot recall, maybe some there and maybe some not, I don't remember.

Q. Have you ever received orders from Grants Pass, Louisiana, for shipping of gasoline to that point?

A. There is no post office there, just stopping off place. I think a majority of the packing plants are Louisiana corporations.

Q. But they are domiciled in Harrison County?

A. Some are and some in Louisiana.

Q. Have you delivered gasoline to plants in Louisiana?

A. Have shipped to plants in Louisiana.

Q. Not included in that statement?

A. Everything is included.

[fol. 51] Q. How was it shipped?

A. By boats.

Q. By their boats?

A. I would not say by their boats, but by boats.

Q. Can you show which were shipped there?

A. I can't. I think a majority of these Harrison County people on this sheet.

Q. Turn over and indicate which are residents of Harrison County.

A. I could not give exactly.

Q. I understand, but asking for best of your recollection?

A. To the best of my recollection, the majority of or greater portion are Harrison County residents.

Q. Can you indicate any who are not, or were not at the time of the sale?

A. Would C. B. Foster Packing Company, who has plant at Fosters Canal, would that be Harrison County resident?

Q. Have they a plant in Harrison County?

A. One plant.

Q. Your order placed there with plant in Harrison County?

A. Yes.

Q. I see on this list Henry Diaz, who is Henry Diaz?

A. He runs a commissary for The Biloxi Canning Company, I think, and all purchases or supplies went through this merchant.

Q. Henry Diaz in Biloxi?

A. Yes.

Q. Same of Peter Quave?

A. Yes.

Q. Wentzell Brothers, who are they?

A. Have packing plant on the point.

Q. In Biloxi?

[fol. 52] A. Yes.

Q. And P. Williams?

A. Agent for us at foot of Pine Street. We have a station down there, and combine independent sales, and instead of making long lost if individuals, group them all under his name.

Q. This gasoline here, 3630, which report shows sold to P. Williams, your local agent at Biloxi?

A. Yes.

Q. And gasoline delivered to him?

A. No, sir; at our pier.

Q. And charged to him?

A. No, charged to those he sold it to.

Q. Why did you make it on your report to him at Grants Pass, Louisiana, when he was local agent?

A. He had in turn sold to Grants Pass, and we just grouped it under one head.

Q. Have you report of these various sales?

A. I think so.

Q. Bills of lading for that?

A. Yes.

Q. Who is George Malley?

A. I don't know.

Q. W. B. Skinner?

A. W. B. Skinner, I think had a packing plant that burned down.

Q. At Biloxi?

A. Yes.

Q. Alfred Bourgeois?

A. I don't know.

Q. Nick Skermetti, do you know who that was?

A. He had a boat named Pan American, he operated in Louisiana waters.

[fol. 53] Q. You- bill-of-lading shows that was delivered to his boat?

A. Yes.

Q. And his boat came to Mississippi waters and got this gasoline and carried it back to Louisiana?

A. I am not sure of that. Nick Skermetti, boat he operates not gasoline burner, fuel oil burner. If he bought gasoline for shipment to Louisiana, hauled it out and sold there.

Q. Came to your place and buy gasoline and carry it out there and sell it? Consigned to him in Mississippi?

A. I could not say, whether shipped to him on that boat, or conveyed to him.

Q. Your bill-of-lading will show that?

A. Yes.

Q. Are there any others that handled it the same way that you know of? That had boats come and get it and carry it over to Louisiana and sell it there?

A. No, I could not say right off hand.

Q. This gasoline was drawn out of your regular tanks into these drums and carried it to your wharf and delivered there?

A. Yes.

Cross-examination.

By Mr. Guice:

Q. You have at your plant in Biloxi, I think, a tank that you use to deliver this oil outside of State from, is that right?

A. I could say yes, and I could say no. We use one tank,—or one tank is sufficient capacity for local demands on which we charge tax. We put in second tank to take care of increase business that developed at that time in shipments out of the State. Often times we operate from [fol. 54] one tank and replace it. We just carry a balance of as small stock as we can over sales to get by with.

Q. What I mean is, there shipments of gasoline by you out of State is material part of your business?

A. Yes.

Q. It is material part?

A. Yes.

Q. Do you make any agreements, or contracts, probably, with people agreeing to deliver to them gasoline out of the State in the manner you set out in your answer to the bill of complaint?

A. Yes. At the time we went into this, can I explain this?

Q. Yes.

A. At the time we went into this, there was one factory bought a load of 100 barrels of gasoline, shipped from Louisiana into Biloxi, and the price was four or five cents a gallon cheaper than what we could sell for, and pay the tax. We saw it would make big inroads into our business, and in fact we could not maintain if that kept up, and we made inquiries from our attorney and I think our attorney got advice from the Attorney General that we were in our rights to ship out of the State to meet this competition. By shipping into Louisiana, we met Louisiana competition.

Q. There was competition in Louisiana?

A. Yes.

Q. Explain to the Court the difference between the price that the Louisiana gasoline dealers could deliver a gallon of gasoline to Grants Pass, and price you could deliver were tax included in your delivery?

Counsel for complainant objects on ground that price of gasoline in Louisiana has nothing to do with the question interstate commerce, or sale in Mississippi.

[fol. 55] Objection overruled.

Q. Go ahead and tell what could a man doing business in New Orleans deliver a gallon of gasoline, what would be the difference between his price and your price, were your tax included?

A. The prices fluctuate in Louisiana, and also in Mississippi. There are times when it could be bought for four cents a gallon less and times six less than we could sell it for with our tax.

Q. Were people in Louisiana competing with you for this business at Grants Pass?

A. Yes.

Q. Were they able to make deliveries at Grants Pass?

A. Yes, and were making delivery out into the marsh, would send freight boats out loaded and are doing it now and are factors in it big.

Q. Could you have sold gasoline that was in Biloxi, except with agreement to deliver it at Grants Pass?

A. No.

Q. Is that the understanding?

A. We agreed if they gave us the whole business, we would deliver it to them according to the understanding that we had with the attorney and the Attorney General we were within the law to do that. We then agreed to keep them supplied with shipments of gasoline to Louisiana at the price, less the tax.

Q. Is it not a fact that a great many of these corporations, while domiciled in Biloxi, also are domiciled in Louisiana, such as Biloxi Canning Factory, C. B. Foster Packing Company, Dunbar Dukate Company, et al.?

A. Yes.

[fol. 56] Q. Grants Pass, you stated, is central distributing point for all kinds of supplies for resident boats out in the Marsh?

A. Yes.

Q. That is also the point the State of Louisiana requires them to go to get a license?

A. Yes, both in and out.

Q. Way of operation of these companies is as follows: That they either own or have arrangements with the owners of small boats to furnish shrimp to them. These boats are manned, whether owned by them or not, or by independent persons, are manned by crews who get the boat for shrimp?

A. Yes.

Q. They are not employed by the month?

A. No.

Q. Get boat for shrimp and go out in the marsh and stay two, three or four weeks, and are supplied from Biloxi by means of these freight boats?

A. Yes.

Q. Is that right?

A. Yes.

Q. Did you know it at time you contracted with these people?

A. Yes, it was explained to me by the factory.

Q. These freight boats that carried gasoline, carried food and other supplies also?

A. I think so. I was told so.

Q. These freight boats carried this out there,—what did they bring back?

A. Shrimp.

Q. Which they bought out in the marsh?

A. Yes.

Q. As a matter of fact, by what agency are most of the [fol. 57] freight boats propelled—by gasoline or fuel oil?

A. Majority of freight boats use fuel oil.

Q. Smaller boats burn what?

A. Gasoline.

Q. And this gasoline is distributed to them in marsh and is charged to the man who buys from you, and through whom you deliver?

A. Yes.

Q. In other words, operation of your business was, you agreed to deliver this gasoline to these people in such quantities as they might need to their boats in marsh, and when ordered, it was with the knowledge of that you were to deliver. You send gasoline down to wharf and put it on wharf, or on boat, and the Captain of the boat receipt you for gasoline with knowe*l*dge and instruction to take to Louisiana, and it was taken to Louisiana and in Louisiana

either consumed on the boats, they had employed, or sold by them to other boats, is that right?

A. That is my distinct understanding.

Q. Did you ever sell any gasoline of your knowledge, or with your consent, to boats, to put there or in hold and sell without arrangement, and not pay tax?

A. When we did, we charged tax. We have lost a great deal of business not doing that.

Q. Can you remember any instance of any gasoline shipped to Foster in Louisiana in one hundred barrels at time?

A. Yes.

Q. What would he do with it to your knowledge over there?

A. Sell it, and used at his own plant at Foster Canal, Louisiana. We sent it there on his boat, and while I was not there, I am told this. I ordered storage tanks for him. [fol. 58] Q. Is there included in gasoline you shipped to Superior Oil Company, sold to Bayou La Batre?

A. All on their report.

Q. How many gallons did that amount to?

A. Between forty and fifty thousand.

Q. Sold as shipped to Bayou La Batre?

A. Yes.

Q. Shipped on what kind of boats?

A. I engaged three times boats from C. B. Foster, and two or three times from Foster Fountain Company, and on maybe dozens occasions shipped fifteen to twenty-five or forty barrels on Sea Food boats, come into Biloxi with cargo of shrimp from Alabama factory, and carry it back.

Q. You paid freight?

A. Yes.

Q. Same identical boats shipped out in marsh on?

A. Identical. They will carry any freight.

Q. Your sworn statement shown there is correct?

A. Yes, to the best of my knowledge that is correct.

Q. And the gasoline you failed to account to the state for the tax on was actually exported by you from the State?

A. Yes.

Q. It was contracted for and shipped from your place of business with the understanding it was to be exported?

A. Yes, and receipted for by the Captain of the boat.

Q. Was that requirement that you were to deliver it there part of your understanding, to be your stuff until it got out of the state?

A. Yes.

[fol. 59] Redirect examination.

By Mr. Sharp:

Q. As I understand you, this gasoline sold to the various packing companies, sold to them and was charged to their fishermen to whom it was delivered, and when the boat comes in with the fish, it is deducted, and they are paid the difference?

A. I presume so.

Q. Way it was explained to you?

Q. The way they settled for it, I was not concerned. We sold it to them in Louisiana, and we understood, to best of our knowledge, it was delivered into Louisiana and Alabama, and as to how they settled for it, it is just hear-say.

Q. That is your information. Sort of like merchant furnishing a farmer, furnishes farmer, and when his crop comes in, buys the cotton or stuff, and takes out amount of account.

A. I understood in some instances did not settle that way. In fact, way they settled for it, I was not concerned.

Q. By this method of handling it was sold into Louisiana?

A. Yes.

Q. But paid no tax in Mississippi or Louisiana?

A. We did not operate in Louisiana, and were not called on to pay tax in Louisiana.

By Counsel for Defendant: We object, as it makes no difference; this stuff exported from Mississippi to Louisiana, delivered in original package, and not taxable.

Objection overruled.

Q. As I understand it, you shipped it there and delivered it to them, and it is yours until delivered to consignee?

[fol. 60] A. It is ours until delivered at Grants Pass.

Q. You deliver it to their men at Grants Pass?

A. They deliver it at Grants Pass.

Q. When you deliver it, it becomes his property?

A. Yes.

Q. No tax is paid in Louisiana?

A. We do not. We do not operate in Louisiana.

Q. Do you knoe of your own knowledge it is unloaded in Grants Pass on boat?

A. I do not, I have never been there.

Q. You don't know?

A. No more than if delivered to Railroad or Express wagon, or ox wagon. I am not supposed to know.

Q. How many of these parties whom I call here are stockholders in your Company, Kennedy Packing Company?

A. They are not.

Q. Henry Dias?

A. He is not.

Q. Deer Island Fish and Oyster Company?

A. They are not.

Q. Gulf Cities Packing Company?

A. Skermetti connected with Deer Island Fish and Oyster Company is connected with our Company.

Q. Anybody else with it?

A. Not that I know of.

Q. Henry Dias?

A. Not that I know of.

Q. Gulf Cities Packing Company?

A. Mrs. Sophie Desporte owns it. Her husband died.

Q. Johnson Canning Company?

A. They are not.

[fol. 61] Q. Phillip Williams?

A. No.

Q. DeSilva Packing Company?

A. No.

Q. Captain Joe Kriss?

A. No.

Q. Desporte?

A. He is.

Q. Gussie Fountain?

A. He is.

Q. Antichich Packing Company?

A. They are.

Q. C. B. Foster?

A. He is.

Q. Desporte Packing Company?

A. They are.
Q. Biloxi Fishermen's Packing Company?
A. Owned by C. B. Foster.
Q. Indirectly?
A. Yes.
Q. Martin Fountain Co.
A. They are.
Q. Foster G Fountain Company?
A. They are.
Q. De Jean Packing Company?
A. He is not.
Q. Williams?
A. No.
Q. Peter Lessa?
A. Don't know him.
Q. Do you know at that,—at what price this is resold to fisherman by the Packing Company?
[fol. 62] A. I am not interested.
Q. You don't know?
A. I have no idea.

L. O. JOHNSON, a witness for complainant, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Sharpe:

Q. You are connected with the Johnson Packing Company, of Biloxi, Mississippi.
A. Yes.
Q. What position, if any, do you occupy with them?
A. I am general manager.
Q. That is packing plant at Biloxi, Mississippi?
A. Yes.
Q. You have been buying considerable gasoline from Superior Oil Company, also domiciled at Biloxi, during the past two years, have you?
A. Gasoline and crude oil.
Q. Explain to the Court how that transaction is handled—gasoline?
A. Most of my boats burn crude oil, as well as gasoline.

Q. I don't care about crude oil.

A. When freight outside, buy several drums of gasoline and put on boat and take it to Grants Pass and from there distribute it among other boats.

[fol. 63] Q. As I understand it, you go to the office at Superior Oil Company, and say you want to get so many gallons of gasoline, and you buy it and have it delivered to your boats?

A. In full drum lots.

Q. And your boats take it to Grants Pass?

A. Yes, and get clearance from State of Louisiana, and then go out. We buy gasoline in broken lots and that is put in boats and they use that to go out. Full drum lots are put on that boat and delivered in Grants Pass and distributed among other boats, and if they have to use any themselves they break it.

Q. Place order there in Biloxi with Superior Oil Company for so many gallons of gasoline?

A. So many drums.

Q. Deliver at your wharf or theirs?

A. Delivered to boats and boats sign bill of lading for Grants Pass.

Q. These are fishing boats?

A. Ours are nothing else.

Q. Not registered as freight boats?

A. No sir, they are freight boats.

Q. Is it required to be kept, registry of boats?

A. No, we pay all expenses, send out to freight shrimp for us—to buy for us.

Q. For you?

A. Yes.

Q. Not common carriers,—your boats?

A. Not my boats.

Q. You have contract to send out and bring in shrimp?

A. Sure.

Q. And when you get this gasoline, it is charged to you, and you pay for it to Superior Oil Company?

A. Yes.

[fol. 64] And they you charge it to your fishermen, or ro the parties to whom you deliver it, and when the catsh comes in, you deduct the amount of their account out of the catch and pay them the difference?

A. Yes.

Q. What price do you furnish it to your fishermen at?

A. Whatever the prevailing price is. What we pay for it.

Q. At same price?

A. What we pay, we furnish to fishermen at that price.

Q. Just furnish to encourage them to get their fish and their catch?

A. Yes.

Q. You have nothing to do further than placing order with Superior Oil Company at Biloxi?

A. We give credit to certain amount of boats. Boats order oil and take to Grants Pass and deliver to State of Louisiana get permit to go ahead to work, and go out among fleet of boats and sell from boats.

Q. None delivered on Grants Pass?

A. No, sir, in Louisiana.

Q. Grants Pass is in Louisiana?

A. Yes, sir; station in Louisiana where we get permits to operate in Louisiana.

Q. No depor or other facilities there?

A. There is a house, I understand. I have never been there myself.

Q. You deliver to boats among fishermen?

A. Yes, sir.

Q. These bills are delivered to you and paid at your plant in Biloxi monthly?

A. Each trip.

[fol. 65] Q. And you have placed in advance with Superior Oil Company an order for so much gasoline for each boat, given credit with Superior Oil Company for so much gasoline?

A. Order four or five drums for oil. Use "Farewell" for instance: takes crude oil for herself and gasoline to supply smaller boats that catch shrimp and put on her.

Q. Delivered down there and charged to you at wharf?

A. Delivered to Captain of boat. He signs bill of lading to take to Grants Pass, and I don't know what he does after he gets there.

Q. Who pays the freight?

A. No freight charge. Did that gratis.

Cross-examination.

By Mr. Guice:

Q. There is no line of railroad running to Grants Pass, is there?

A. No.

Q. There is no regular packet line Superior Oil Company could deliver this stuff to?

A. No.

Q. Is there large fleet of boats out there in Spring and Winter, have one hundred and one hundred and fifty at a time?

A. Several hundred.

Q. Boats stay week or two, or three, or four, and put catch on shore at Biloxi?

A. Stay as high as seven weeks.

Q. When they want food, or gasoline, order in Biloxi, and what you call freight boats take it out and deliver to their boat?

A. Send order and get groceries and stuff.

[fol. 66] Q. And same boats carry their stuff and deliver it?

A. I understand that.

Q. That is way seven or eight hundred men subsist out on the marsh?

A. Never come in under two weeks.

Q. Way they subsist?

A. Yes.

Q. There is no store there?

A. Not that I know of.

Q. All have their supplies carried on these boats?

A. I understand that to be right.

Q. You understand arrangement with Superior Oil Company, that they deliver for your boat, or whatever boat you designate out to these smaller boats?

A. I think so.

Q. And Superior Oil Company delivered instruction for captain of boat to deliver on these boats consigned to Grants Pass this gasoline?

A. I don't get that.

Q. And Captain of your boat had instructions—was ordered to deliver to his order on that boat, any number of drums of gasoline?

A. Yes.

Q. Who would ring up and order this stuff?

A. Ordered as many as required.

Q. Deliver on your boat and bill of lading signed there?

A. And sent to Grants Pass that day.

Q. Do you remember getting gasoline in Biloxi, put on your boat, or used, at any point of designation, not billed for, or tax added?

A. What is that?

[fol. 67] Q. When you got your gasoline in Biloxi at your factory, was tax added to your gasoline?

A. Why sure.

Q. You paid that?

A. They paid that. Charged on gasoline. We have nothing to do with paying tax. We pay for oil and they do that.

Redirect examination.

By Mr. Sharp:

Q. Pay for gasoline each trip, as go out?

A. No, I pay my bill for gasoline every thirty, present me with bill.

Q. You just pay your account monthly with Superior Oil Company?

A. Yes.

Q. When does that become your gasoline?

A. It never becomes mine that I know of. Boatmen get it.

Q. It is charged to you?

A. I stand good for it. Boatmen used it and when they come they settle with me. I understood Superior Oil boatmen used. I never use it.

Q. You place order?

A. The Captain of the boats place it. I give certain boats credit. I notify them what boats freighting for me in Louisiana, and give them oil asked for.

Q. This is charged to you?

A. At end of month I get bill and check against the boats.

Q. How many boats do you own?

A. Six.

Q. What are they?

A. Jennie Johnson, Farewell, Wampas, Catalog, Princess Pat and Sheik.

[fol. 68] Q. Which of the six are oil burning boats?

A. All but Jennie Johnson.

Q. Jennie Johnson is not?

A. She burns gasoline.

Q. Others have no gasoline engines on them?

A. Use gas oil or crude oil.

Q. Have no gasoline engine?

A. Can burn crude oil.

Recross-examination.

By Mr. Guice:

Q. Is it fact that your business is divided into two types, or two places. You pack—clean and pack shrimp and oysters in Biloxi. You buy, and have regular place to buy these things, which is your boat in Louisiana?

A. We handle ninety-nine per cent of our shrimp out there off freight boats.

Q. You buy there?

A. Bought in State of Louisiana.

Q. Engaged in business there as much as in Mississippi?

A. Yes.

Q. Plant for packing in Mississippi, but buy in Louisiana?

A. Yes.

[fol. 69] CAMILLE DE SILVA, a witness for complainant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharp:

Q. You are connected with the De Silva Packing Company?

A. I was until lost it; I—it burned down little over a year ago.

Q. At time these items of gasoline charged against you, that concern was domiciled in Biloxi?

A. Yes.

Q. You bought gasoline in the last three years from Superior Oil Company?

A. Yes.

Q. At Biloxi?

A. Yes.

Q. How did you purchase that, and how was it handled?

A. Well, the boats we had in Louisiana, all gasoline bought from Grants Pass.

Q. How would you place order, and how was it delivered?

A. Way we placed order, we order drum of gasoline.

Q. Got from Superior Oil Company?

A. Yes.

Q. How ordered to deliver, at your wharf of their wharf?

A. We rung them up and they have stuff and boat come by and pick it up.

Q. Your boats?

A. Yes.

Q. And carried it to Grants Pass or Louisiana Marsh, and delivered to boats?

A. Yes.

[fol. 70] Q. You charged it to boatmen there, and whenever settled, paid Superior Oil Company, and collected from fisherman out of catch?

A. Yes.

Q. You deducted amount of supplies, including gasoline and paid them the difference?

A. Yes.

Q. You paid to Superior Oil Company?

A. Yes.

Q. Shipped in your boats, or boats under your control?

A. Yes.

Cross-examination.

By Mr. Guice:

Q. Ring up and tell them wanted drum of gasoline to ship to Grants Pass?

A. Yes.

Q. Boat stop by wharf?

A. Yes.

Q. And it was understood that was used for export, and not used in Mississippi?

A. Yes.

Q. And carried out in Louisiana marsh and sold by you to other men out there?

A. Yes.

Q. Other people out there?

A. Yes.

[fol. 71] STIPULATION RE TESTIMONY, ETC.

For the purpose of shortening the record it is hereby agreed that all of the shipments shown on the report and all of the sales shown on the report marked Exhibit "A" and filed in this cause were handled in the same manner as shown by the testimony already introduced, and it is agreed that the witnesses would testify that each and every sale reported as non taxable was sold and handled in the manner already testified to, and that the boats carrying the gasoline were and are classified by the United States Government as being engaged in fishing. It is further agreed that if the defendant, if liable, it it liable only on shipments to Louisiana, and not to shipments to Alabama; and if liable at all, is liable on all of shipments to Louisiana as shown by Exhibit "A."

This is all of the testimony and evidence introduced on the trial of this cause.

[fol. 72] IN CHANCERY COURT OF HARRISON COUNTY

[Title omitted]

DECREE—Filed April 28, 1928

This cause coming on to be heard on Bill of Complaint, Answer thereto, Exhibits, motion to dissolve the injunction

herein, and oral testimony heard by the Court and the Court having fully considered same as well as arguments made thereto, is of the opinion that the allegations of the bill are not sustained, and the same should be dismissed and the injunction heretofore granted herein shall be dissolved.

It is therefore ordered that the Bill of complaint be and the same is hereby dismissed and that the injunction heretofore granted in this cause be and the same is hereby dissolved, and the bond posted herein is hereby released, both principal and sureties thereon being fully discharged, and complainant having prayed an appeal to the Supreme Court of Miss. with Supersedeas same is hereby granted in open Court.

Ordered, adjudged and decreed this the 7th day of February, A. D. 1928.

V. A. Griffith, Chancellor.

[File endorsement omitted.]

[fol. 73] Minute entry of argument and submission May 21, 1928, omitted in printing.

[fol. 74] IN SUPREME COURT OF MISSISSIPPI

No. 27247

STATE ex Rel. RUSH H. KNOX, Attorney General,

vs.

SUPERIOR OIL COMPANY

ORDER OF AFFIRMANCE—June 11, 1928

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Harrison County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the January Term, 1928, on February 7th, 1928, be and

the same is hereby affirmed. It is further ordered, adjudged and decreed that the State of Mississippi do pay the costs of the clerk of this court out of appropriation made therefor in cases in which the State fails.

[fol. 75] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

Ethridge, P. J.

[Title omitted]

OPINION—Filed June 11, 1928

The Superior Oil Company, a corporation domiciled and having its place of business at Biloxi, Mississippi, is engaged in the sale and distribution of gasoline In the course of its business it orders gasoline from refineries located outside the state; the gasoline is shipped in tank cars from the place of origin to Biloxi, and there unloaded into large storage tanks owned by the Oil Company From these tanks it is drawn into drums, tanks, barrels, and other containers, as needed or business demands Appellee sells the gas from these storage tanks at both wholesale and retail, to filling stations and to individuals, in such quantity as desired by the purchaser. It also sells large quantities of gasoline to concerns engaged in the fishing and packing business. The gasoline sold to individuals and filling stations is reported to the Auditor and the tax paid thereon. The gasoline sold to the packing companies and fishermen is also reported to the Auditor but is reported as "Shipped in interstate commerce," or other similar terms used in the reports indicating interstate commerce.

The arrangement by which this interstate commerce is conducted, as shown by the evidence, is that the fishing company or packing company buys gasoline in sealed drums, consigned to it at Grants Pass, Louisiana, at which point such companies have men stationed who are engaged in [fol. 76] catching fish and other seafood for use in their business. The gasoline so purchased by the fishing company or packing company, is charged to such Company and delivered on the wharf at Biloxi to a boat owned by the

fishing company or packing company. The contract between the Superior Oil Company and such fishing company or packing company, provides that the title is not to pass until the shipment reaches its destination, but provides that the packing company or fishing company, or the boat owned by it, shall carry the gasoline to Grants Pass without charge to the seller and assume all responsibility for the safe delivery of the gasoline at its destination. The gasoline is then sold by the packing company or fishing company to the individuals engaged by it to catch fish and other seafood for its use, and the gasoline is charged to such fishermen by the packing company or fishing company, and the amount of such deducted from the sum due by the packing company or fishing company to the fishermen for their services.

The State, through the Attorney General, brought this suit to recover the excise tax imposed by law on the sale of gasoline in this State, and it is contended that the arrangement herein described is a mere scheme to avoid the payment of the tax due the State, and that the delivery of the gasoline on the wharf at Biloxi to the boat owned by the packing company or the fishing company, to be carried by it, free of charge, to the State of Louisiana, and there sold, is not, in fact, an interstate commerce transaction, but is the transaction of business in Mississppi, and the State is entitled to collect the tax levied upon the gasoline sold in the State under such arrangement.

The master of the boat signs the bill of lading for such [fol. 77] goods. Said bill of lading contains the following stipulation:

"In consideration of the packet rate charged for carrying property described hereon, the owners of this boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit causes by carelessness or negligence, this damage and loss shall be sustained by the owners of boat accepting this shipment."

Both the Superior Oil Company and the fishing companies and packing companies reside in the city of Biloxi. The Superior Oil Company charges the gasoline at once to the company purchasing it; it does not wait until it gets notice of delivery of the gas in Louisiana.

The decision of this case will turn upon the question, whether this transaction constitutes interstate commerce.

In the case of United States vs. Simpson, 252 U. S. 465, 64 L. ed. 665, 45 S. C. 364, 10 A. L. R. 510, the Supreme Court of the United States held that, the transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, par. 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

The indictment in that case charged that the defendant, being in the city of Cheyenne, Wyoming, 'bought, paid for, and owned,' 5 quarts of whiskey, and thereafter in his own automobile, driven by himself, transported it into the city of Denver, Colorado, intending there to devote it to his own [fol. 78] personal use. Colorado prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes. The court decided that this transaction constituted interstate commerce within the meaning of such Act

There was a similar holding in the case of United States vs. Hill, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. 143. In that case the indictment charged that Hill, on the 20th of November, 1917, being in the state of Kentucky, there intended to go and be carried by means of a common carrier, engaged in interstate commerce, from the state of Kentucky into the state of West Virginia, and intended to carry upon his person, as a beverage, for his personal use, a quantity of intoxicating liquor, to wit, one quart thereof, into the state of West Virginia, and did in the State of Kentucky purchase and procure a quantity of intoxicating liquor, to wit, one quart thereof, contained in bottles, and did then and there board a certain trolley car being operated by a common carrier corporation engaged in interstate commerce, and by means thereof did cause himself and the said intoxicating liquor, then upon his person, to be carried and transported in interstate commerce into the state of West Virginia. It is charged that this was done in violation of the Act of Congress approved March 3, 1917,

commonly known as the Reed Amendment, and that the transaction constituted interstate commerce.

In the case of Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. 419, it was held that, "The business carried on within the state of Kansas by a liquor dealer who maintains an office and warehouse in a small town on the Missouri side of the Missouri river, connected by a bridge with Leavenworth, Kansas, and who fills all orders for liquors from Kansas customers by deliveries from such warehouse in his own horsedrawn wagons, either directly [fol. 79] or by hauling the liquor to the Leavenworth railway depots for transportation to other Kansas points, all mail orders from Kansas customers being carried across the river before being opened, and all liquor received by him at the railway depots at Leavenworth, though destined for Kansas customers, being first hauled by him to the warehouse across the river—is none the less interstate commerce, and, as such, protected from state interferences, because such dealer is a citizen of Kansas, who, having long carried on an illegal liquor trade in Leavenworth, moved his business across the river to evade the Kansas prohibitory laws, without changing his residence, or removing from Leavenworth the wagons and teams used by him in conducting the business."

In that case the Supreme Court of the State of Kansas reversed the trial court, which had held that the shipment was in interstate commerce, with which the state could not interfere. The Supreme Court reversed it on the ground that it was a mere evasion of the Kansas law, and in its opinion said: "The broad question here is whether the defendant was really engaged in commerce between the states of Missouri and Kansas, or was he only seeking by tricks and devices to evade the laws of his state—doing by indirection that which could not lawfully be done by ordinary and direct methods? Referring to numerous opinions of this court it further said they 'do not preclude a fair inquiry into methods and practices in order to determine whether transactions under investigation constitute legitimate interstate commerce or are colorable merely, and intended to evade and defeat the just operation of the Consitution and law of the state.' " The court further said, "It is true that a citizen of Kansas who finds that his business is pro-

hibited by our laws may in *food* faith engage in the same business in another state where the legal obstacle does not exist. But he may not, under the guise of moving across the state line, and other shifts or devices to evade the statutes of the State, continue in the prohibited business [fol. 80] here and be immune from the penalties of our law. From the facts found by the court and from the testimony of the defendant, it appears that his business was not legitimate interstate commerce, but was carried on in violation of the statutes of this state, and is subject to abatement and injunction."

The United States Supreme Court condemned this view of the state court, and held that the transaction constituted interstate commerce. The court said: "The essential facts disclosed by the record are summarized in paragraphs (a) and (b) following.

"(a) Rigorous statutes have long prohibited the sale of intoxicating liquors within the state of Kansas. The city of Leavenworth lies on the Missouri river; on the opposite bank in Missouri is Stillings, a village with one store, roundhouse, a few residences eight or ten beer warehouses, and a freight depot without a regular agent, but no postoffice. For a long time plaintiff in error has resided in Leavenworth, and prior to 1907 he carried on there an illicit beer trade; for use in the same he there maintained a business place and warehouse and kept wagons and teams. *In that year, alarmed by the activities of officials, he discontinued this office and warehouse and kept wagons and teams.* In that year, alarmed by the activities of officials, he discontinued this office and warehouse and immediately opened others in Stillings, and connected them with the Leavenworth telephone exchange. He did not change his residence nor remove his wagons and teams from Leavenworth, but kept them in quarters connected by telephone with the local exchange, and continued to use them for hauling to and [fol. 81] from the new warehouse and making deliveries. Thereafter he received at Stillings barrels, cases, and casks of beer in carload lots from Kansas City and other points; sometimes he received like merchandise at the railroad depot in Leavenworth, which was then hauled across the river. At the Stillings office he received and accepted orders for beer to be delivered in Leavenworth and other points

in Kansas. Eighty-five per cent came by telephone; the remainder through the Leavenworth postoffice, but these were carried to his place of business before being opened.

"(b) Accepted orders for delivery in Leavenworth were filled by setting aside the cases, kegs, or casks in the warehouse, tagging them with the names of the purchasers, and then sending them daily—sometimes, oftener—over the bridge in his wagons to the residences of purchasers. For such deliveries no charges were made. If the goods were intended for other points in Kansas they were hauled to the railroad station at Leavenworth, and there turned over to the carrier. The business for the most part was 'family trade', for private use only, and amounted to $500.00 per month. A license tax was paid to the Federal government; also merchant's and ad valorem taxes to Missouri; he had no Kansas license. The empty cases were gathered up by the drivers throughout Leavenworth, loaded in cars there, and shipped to some other state. Advertisements in two Leavenworth papers announced his business and location at Stillings, and likewise gave the telephone number at the horse barn. When parties desiring beer called over this telephone they were advised to call the Stillings office. Collections were usually made by the plaintiff in error or by collectors; sometimes by mail. Drivers [fol. 82] received no orders from purchasers."

In the concluding portion of the opinion the court after reviewing the cases cited, said: "Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicil in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the state, suffice to change the nature of the transactions. Otherwise one of two persons located side by side in the same state, and doing the same business in identical ways, might be engaged in interstate commerce while the other was not."

We think this case is controlling and the transactions here under review are very similar to the ones there held

to be interstate commerce. See Rossi vs. Pennsylvania, 35 Sup. Ct. Rep. 677, 59 L. ed. 1201, 238 U. S. 62; U. S. vs. Ohio Oil Co. 34 Sup. Ct. Rep. 957, 234 U. S. 548, 58 L. ed. 1459; Texas & N. O. Ry. Co. vs. Sabine Tram Co., 227 U. S. 116, 33 Sup. Ct. Rep. 229, 57 L. ed. 442; State of Missouri vs. Kansas Natl. Gas Co., 265 U. S. 298, 44 Sup. Ct. Rep. 554, 68 L. ed. 1027; Pennsylvania Gas. Co. v. Public Service Com. 252 U. S. 23, 40 Sup. Ct. Rep. 279, 64 L. ed. 534; Public Utilities Com. vs. Attleboro St. & El. Co. 273 U. S. 83, 47 Sup. Ct. Rep. 297, 71 L. ed. 549; Baltimore & Ohio S. W. R. R. vs. Seattle, 263 U. S. 166, 43 Sup. Ct. Rep. 28, 67 L. ed. 189; Lemke v. Garmers Grain Co., 258 U. S. 50, 42 Sup. Ct. Rep. 244, 66 L. ed. 458; Binderup v. Pathe Exchange, 263 U. S. 291, 44 Sup. Ct. Rep. 96, 68 L. ed. 308.

The judgment of the court below will be affirmed.

Affirmed.

[File endorsement omitted.]

[fol. 83] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER REMANDING CAUSE FOR ARGUMENT BEFORE DIVISION "A"—Sept. 24, 1928

Ordered that this cause be remanded to Division "A" for argument on November 12th, 1928.

[fol. 84] Minute entry of argument and submission November 12, 1928, omitted in printing.

[fol. 85] IN SUPREME COURT OF MISSISSIPPI, EN BANC

No. 27247

STATE ex Rel. RUSH H. KNOX, Attorney General,

vs.

SUPERIOR OIL COMPANY

DECREE—Dec. 22, 1928

This cause coming on to be heard on the suggestion of errors filed herein and this court having sufficiently examined and considered the same, doth order, adjudge and decree that said suggestion of errors be and the same is hereby sustained. It is further ordered, adjudged and decreed that the decree of this court entered in this cause on June 11th, 1928, be and the same is hereby cancelled and set aside and that the following decree be now entered herein.

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Harrison County and this court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order, adjudge and decree that the decree of said Chancery Court rendered in this cause at the January Term, 1928, on February 7th, 1928, be and the same is hereby reversed and this court proceeding now, here, to render such decree as should have been entered and rendered in the court below, doth order, adjudge and decree that the appellant, State-Ex Rel. Rush H. Knox, Attorney General, do have and recover of and from the appellee Superior Oil Company the sum of Twenty Five Thousand, Two hundred and Fifty Four and 98/100 Dollars with 6 per cent interest per annum from November 1st, 1927, to this date, amounting to One Thousand, Seven Hundred and Twenty-Five and 74/100 Dollars a total of Twenty Six Thousand, Nine Hundred and Eighty and 72/100 Dollars together with interest on this sum from this date until paid and also the costs of this cause in this court and in the court below, to be taxed, etc.

[fol. 86] IN SUPREME COURT OF MISSISSIPPI, EN BANC

[Title omitted]

OPINION ON SUGGESTION OF ERROR—Filed Dec. 22, 1928

ANDERSON, J.:

Appellant, the State, on relation of the Attorney General, filed the bill in this case in the Chancery Court of Harrison County against appellee to recover of the latter gasoline excise taxes alleged to be due appellant by appellee for the period between the first day of April, 1926, and the first day of November, 1927, under the provisions of Chapter 119, Laws of 1926, and the statutes of which that Act was amendatory. The case was tried on bill, answer and proof, resulting in a final decree dismissing appellant's bill. From that decree appellant prosecutes this appeal.

Appellee contended, and the Chancellor held, that for the State to impose the excise tax sought to be recovered by the appellant would violate Paragraph 3, Section 8, Article 3, of the Constitution of the United States, which confers on Congress the power to regulate commerce among the several States.

If appellee was due the State any gasoline excise taxes when the bill in this case was filed, it was for gasoline sold by appellee to certain packers of seafood at Biloxi, and by the latter shipped into Louisiana. As to all such gasoline the appellee contends that the contracts of sale and purchase thereof were part of interstate commerce, and, therefore, under the commerce clause of the Federal [fol. 87] Constitution, the State was without power to burden such commerce by imposing excise or privilege taxes thereon. While appellant contends that under the facts of the case, the contracts for the sale and purchase of such gasoline were no part of, and had no relation, whatever, to interstate commerce, and that, therefore, the gasoline sold was taxable under Chapter 119, Laws of 1926, and the statutes of which that Act was amendatory, as if it had been sold in and had never left this state.

There was no conflict in the evidence as to the controlling facts which were as follows: Several packers of seafood, doing business in and near Biloxi, bought large quantities

of shrimp and other seafood from fishermen engaged in fishing therefor out in the marshes near Grants Pass in the State of Louisiana. It was necessary for these fishermen to be supplied with gasoline and other supplies while they were engaged in making their catch. The packers who bought their catch furnished this gasoline and other necessary supplies, to be paid for when their catch was brought in and purchased by the packers. These packers owned boats which plied between Biloxi and Grants Pass. They purchased gasoline from appellee and others and transported it to the fishermen in such boats, which would take the gasoline out into the Louisiana marshes near Grants Pass, and there deliver it to the fishermen to whom it was charged by the packers, and, by the fishermen paid for as stated. On the trial, it was agreed between the parties that the transactions had between appellee and the Gussie Fountaine Packing Company exemplified the manner in which appellee sold and delivered to the packing companies all the gasoline involved in this cause. The Gussie Fontaine Packing Company bought shrimp and, perhaps, other seafood, from fishermen in Louisiana near Grants Pass. The fishermen needed gasoline, and the Packing Company would purchase the required amount [fol. 88] from appellee on open account to be paid for on the first of the succeding month. Appellee would then deliver this gasoline in containers on the wharfs at Biloxi to the Packing Company, where it would be loaded into its own boat and transported to its fishermen. The fishermen came in about every two weeks, and the Packing Company would then have a settlement with them in which they would be charged with the gasoline so delivered to them by the Packing Company, and credited with the amount due them by the Packing Company, for their catch. The boat owned by the Gussie Fontaine Packing Company, the Frank Louis, was not a common carrier of freight, but was used by the Packing Company alone for its own purposes, principally for transporting supplies, including gasoline, to its fishermen between Biloxi and Grants Pass, which boat was registered as a fishing boat. When the Gussie Fontaine Packing Company purchased gasoline from appellee for transportation to Grants Pass for the

purposes named, it executed and delivered to the appellee a receipt or bill of lading as follows:

"No. 4882. Biloxi, Miss., 12/20, 1927.

Received in good order and condition from Superior Oil Company, Biloxi, Miss.,

No. pieces	Description of articles	Weight
2	Drums gasoline.....	.....

Consigned to Gussie Fontaine Pkg. Co. Destination: Grants Pass, La. By boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co. The Master of said boat, Frank Louis, acknowledges receipt of said goods and agrees to deliver merchandise as consigned in like good order and condition.

[fol. 89] "It is further understood and agreed that the property consigned herein remains the property of the said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination, but that all due caution and carefulness will be exercised by Master and Crew of said Boat Frank Louis to protect said property and effect a safe delivery without undue delay.

"In consideration of the packet rate charged for carrying property described herein the owners of this Boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit caused by carelessness or negligence, this damage and loss shall be sustained by owners of boat accepting this shipment.

366-537.

(Signed) Joseph Adams, Master of Boat Frank Louis.

Received $Collect to apply in prepayment of packet charges, on property hereon described from Biloxi, Miss., to Grants Pass, La.

—— ——, for Master of Boat."

Appellee is a corporation located and doing business in Biloxi, Harrison County, Mississippi, selling and distribu-

ting gasoline at Both wholesale and retail. The Gussie Fontaine Packing Company is also a corporation located and doing business in Harrison County, Mississippi.

[fol. 90] It will be seen from what has been stated that the Gussie Fontaine Packing Company purchased its gasoline from appellee to be delivered to it on the wharf at Biloxi, where it was received by the Packing Company's boat, loaded therein, and transported to Grant's Pass, and there sold to the Packing Company's Fishermen. No freight was paid by either the appellee or the Packing Company. There was no depot or station at Grant's Pass, or anywhere else in the Louisiana marshes, to which goods shipped could have been consigned. Grant's Pass was merely a touching point for boats, but was not a place of business for the receipt and distribution of freight. There was no common carrier of freight, either by rail or water, between Biloxi and Grant's Pass.

Putting the facts of the case in a short way;— Appellee, a corporation of this state, doing business at Biloxi, sold the gasoline involved in this case to various packers of seafood also located and doing business at Biloxi, and charged the purchase price to the packers on open account payable at the end of the succeeding month. Under the contracts of purchase, the appellee delivered the gasoline on the wharfs at Biloxi, where it was loaded by the packers into their own boats, and by such boats transported to the fishermen supplying the packers with seafood for packing purposes. The fishermen were plying their avocation in the Louisiana marshes near Grant's Pass. The packers sent the gasoline out there and sold and delivered it to their fishermen who paid for it as stated. In other words, the sales and purchases of the gasoline were between parties doing business in this state, and were negotiated and consummated between them in this State, unless it can be said that the reservation of title to the gasoline in the appellee by the terms of the bills of lading issued by the purchasers until it was delivered at Grant's Pass, changed the transaction from a domestic one to an interstate commerce transaction.

[fol. 91] The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this State, to a point near Grant's

Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and purchase of gasoline between the appellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline as set out in the bills of lading therefor issued by the boat master of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing.

The title to the gasoline was not reserved in the appellee for the purpose of securing the payment of the purchase price thereof. There is no pretense of that kind on the part of the appellee. Nor was it retained for any other purpose, so far as the record shows, unless it was a means of trying to convert purely domestic transactions into interstate commerce transactions. The packers, as stated, transported the gasoline into Louisiana by means of their own boats, which were not common carriers, and no freight was paid by either the appellee or the packers for such transportation. Under the stipulations in the bills of lading, the packers assumed all responsibility for safe delivery of the gasoline to their fishermen, including all damage thereto in loading and unloading and transferring same, and loss by [fol. 92] leakage in transit. What protection or security did the reservation of title to the gasoline until delivery to the consignee afford appellee? What, if anything, did appellee gain, or what could it have gained by it? We are unable to see any. My Royster, the General Manager of appellee, in effect, confessed, as a witness for his company, that the retention of title in the bills of lading was for the purpose of converting transactions exclusively domestic

in their nature into transactions in interstate commerce. We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another State. It is much more difficult when the purchaser retains control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidentially on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out. It is true that the mere power of a shipper to divert a shipment already begun does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith, nor does a temporary interruption of the passage when reasonable and in furtherance of the intended transportation. Hughes v. Minnesota, 272 U. S. 468, 71 L. ed. 259; Champlain Realty Company v. Brattleboro, 260 U. S. 364, 67 L. Ed, 309; Railroad Company v. Mims, 111 Miss. 574, 71 So. 827. In Browning v. Waycross, 233 U. S. 16, 58 L. ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a non [fol. 93] resident manufacturer of such rods in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license without violating the commerce clause of the Federal Constitution, although such contracts bound the seller, at his own expense, to attach them to the houses of the persons who ordered them. The court further held in that case that it was not "within the power of the parties by the form of their contract to convert what was exclusively a local business, subejct to state control, into an interstate commerce business protected by the commerce clause."

We do not think that United States v. Simpson, 252 U. S. 465, 64 L. ed. 665, 10 A. L. R. 510; United States v. Hill, 248 U. S. 420, 63 L. ed. 331, and Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, are in point. Those cases simply

hold that intoxicating liquor transported across State lines was interstate commerce, regardless of what the purpose was in so transporting the liquor. That is not the question here. The gasoline involved in this case, immediately after its purchase by the packers, moved in interstate commerce; it was purchased with that intention. Both the seller and the purchaser knew that the gasoline was going to move across the State line into Louisiana. But, what did that have to do with the contracts of sale and the purchase? If the appellee, under the contract, had any real substantial part in the tranportation of the gasoline into Louisiana, that would make them interstate commerce transactions. But, the evidence shows, beyond any doubt, that appellee had no part in the transportation. It simply delivered the gasoline to the packers in this state who took charge of it and transported it into another state. All the appellee has to hang to make interstate commerce transactions out of these sales of gasoline is the stipulation in the bills of lading [fol. 94] providing for the retention of title in appellee until the gasoline should be delivered to the consignee at Grant's Pass, Louisiana, and this stipulation stands right in the face of the undisputed fact that there was no consignee, at or near Grant's Pass. And, furthermore, as shown, the gasoline was delivered by the appellee to the packers on the wharfs at Biloxi in this state, and there the packers, by means of their boats, took charge of it and transported it to Grant's Pass for sale to their fishermen, but that they were under no enforcible obligation to appellee to do so. They were free to transport the gasoline to any other point in or out of this state. The gasoline, in other words, was delivered to the consignees right here in the State, on the wharfs at Biloxi, and, therefore, the provision in the bills of lading, fixing Grant's Pass as the place of delivery, was no more than so much blank space. The packers purchased the gasoline from the appellees in this state, and paid for it. What real concern, therefore, did appellee have as to where the gasoline was to be transported, and by what means? We can see no reason whatever. The contracts of purchase and sale were complete when the gasoline was delivered on the wharfs in this state. No security was demanded by, or given appellee by the packers for payment of the purchase price. Under the

provisions of the bills of lading, the entire risk of loss in transportation was assumed by the packers, and if that had not been done, it seems that any loss in transit would have fallen on the packers because the gasoline was being carried in their own boats.

We cannot give our assent to the proposition that the bare fact that the appellee and the packers went through the form in the bills of lading of providing that the title to the gasoline should remain in appellee until delivered to the [fol. 95] consignee at Grant's Pass, made the contracts of sale and purchase of the gasoline interstate commerce transactions. We think there is little substance in that position. It is too shadowy. It is without sound reason.

It follows from these views that the Suggestion of Error should be sustained, and the judgment heretofore rendered in this case by this court set aside, and that this court should now render the judgment that the court below should have rendered, which is that the appellant recover of the appellee the sum of $25.254.98, with six per cent interest from November 1st, 1927, representing the amount shown by the evidence to be due by the appellee to the State for the taxes sued for. Reversed and Suggestion of Error sustained; former judgment in this case set aside; decree of court below reversed, and decree here for appellant.

Suggestion of error sustained, and reversed and judgment here for appellant.

Cook and Ethridge, J. J., dissenting.

[File endorsement omitted.]

[fol. 96] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

DISSENTING OPINION—Filed Dec. 22, 1928

ETHRIDGE, J., dissenting:

After a protracted consideration, involving the re-examination of the authorities, I am unable to concur in the views of the prevailing opinion. I could well stand upon the original opinion written herein, but there are authorities which were not commented upon in that opinion, which

lend great strength to the views expressed in the original opinion.

The evidence in the case shows conclusively that the articles were purchased from the Superior Oil Company, to be sent into Louisiana. It was distinctly understood by the buyer and the seller that the articles were to be sent beyond the boundaries of Mississippi, and were not to be consumed in Mississippi. Every citizen in this state, as well as in others, has the right to engage in interstate commerce, and to procure for himself any advantage that may flow from so engaging in such commerce.

The tax here sought to be collected by the state is an excise tax, laid upon the right to exercise the business here involved. The state has no power whatever to tax this right, or to put any restrictions upon it. However, the evidence shows conclusively, I think, that the transaction was not one to evade the state law, but was one of practical necessity to the business of the appellee, the defendant below. The manager of the Superior Oil Company testified that that company was engaged in both intrastate and interstate commerce, and that the interstate commerce constituted a material portion of their business; that that [fol. 97] company sold locally in Mississippi, and transported oil and gas to Alabama, and there resold it, but did not personally go into the state of Louisiana to do business, and had no domicile or location in that state.

Among other things Mr. Royster, the manager, testified:

"At the time we went into this, there was one factory bought a load of 100 barrels of gasoline, shipped from Louisiana into Biloxi, and the price was four or five cents a gallon cheaper that what we could sell for, and pay the tax. We saw it would make big inroads into our business, and in fact we could not maintain if that kept up, and we made inquiries from our attorney and I think our attorney got advice from the Attorney General that we were in our rights to ship out of the state to meet this competition. By shipping into Louisiana we met Louisiana competition.

"Q. There was competition in Louisiana?

"A. Yes.

• • • • • • •

"A. The prices fluctuate in Louisiana, and also in Mississippi. There are times when it could be bought for four cents a gallon less and times six cents less than we could sell it for with our tax.

"Q. Were people in Louisiana competing with you for this business at Grant's Pass?

"A. Yes.

"Q. Were they able to make deliveries at Grant's Pass.

"A. Yes, and were making delivery out into the marsh, would send freight boats out loaded and are doing it now and are factors in it big.

"Q. Could you have sold gasoline that was in Biloxi, except with agreement to deliver it at Grant's Pass.

[fol. 98] "A. No.

"Q. Is that the understanding?

"A. We agreed if they gave us the whole business, we would deliver it to them according to the understanding that we had with our attorney and the Attorney General we were within the law to do that, we then agreed to keep them supplied with shipments of gasoline at the price, to Louisiana, less the tax."

It will thus be seen that it was a practical necessity for the defendant to engage in interstate commerce to successfully carry on the business against competition already existing. The contract of shipment, or receipt or bill of lading—whatever it may be called—set forth in the prevailing opinion, is clearly a contract for interstate shipment of goods or property. In that contract, to make sure that the gasoline would be delivered in Louisiana, and not used or sold in the state of Mississippi, it was provided:

"It is further understood and agreed that the property consigned herein remains the property of the said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination."

It is perfectly legitimate to so provide in the contract. One of the liberties of a citizen is the right to make necessary contracts with reference to his business, when it may be necessary or appropriate to enjoy his right or liberty. Allgeyer vs. La., 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41, U. S. L. Ed. 832.

The appellant plants itself upon the proposition that the contract was completely performed when the gasoline was delivered at the wharf to the boat owned by the purchaser of the gasoline, although the gasoline as purchased for the express purpose of being shipped into Louisiana, and despite the fact that title was reserved in the seller until it reached that point.

[fol. 99] In Dahnke-Walker Milling Co. v. C. T. Bondurant, 257 U. S. 282, 66 L. ed. 239, the court expressly held that where goods are purchased in one state for transportation to another, the purchase is interstate commerce, quite as much as the transportation. In the opinion (257 U. S. 290, L. ed. 243) the court said:

"The commerce clause of the constitution, art. 1, sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688, 689; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. ed., 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Exp. Co. v. Iowa, 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in Welton v. Missouri, 91 U. S. 275, 280, 23 L. ed. 347, 349: 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in [fol. 100] any and all its forms, including the transportation, purchase, sale and exchange of commodities: In Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: 'Buying and selling and the transportation incidental thereto con-

stitute commerce.' In U. S. v. E. C. Knight Co., 156 U. S., 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, 'contracts to buy, sell or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in Addyston Pipe and Steel Co. v. U. S. 175 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

See, also, United Fuel Gas Co. v. Hallanan, 257 U. S. 277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105; Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. ed. 227, Lemke v. Farmers' Grain Co. 258 U. S. 50, 42 Sup. Ct. Rep. 244, 66 L. ed. 458; Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 42 Sup. Ct. Rep. 305; Shafer vs. Farmers' Grain Co. 268 U. S. 189, 45 Sup. Ct. 481, 69 L. ed. 909; Pa. R. Co. v. Sonman S. C. Co. 242 U. S. 120, 37 Sup. Ct. 46, 61 L. ed. 189, Binderup [fol. 101] v. Pathe Exchange, 263 U. S. 291, 44 Sup. Ct. 96, 68 L. ed. 308. In the cases where the goods were f. o. b. cars at place of shipment to be sent into other states was a delivery to consignee at that place. The carrier was the agent of consignee.

It seems to me that the cases cited in the original opinion show beyond question that the instrumentality by which property is conveyed from one state to another does not make any difference, and does not change interstate transportation to intrastate transportation. In U. S. v. Simpson, 252 U. S. 465, 64 L. ed. 665, 35 Sup. Ct. Rep. 364, 10 A. L. R. 510, was a case where the jurisdiction of Congress over the transaction depended upon the interstate commerce power, and the intoxicating liquor in that case was transported in the automobile of the defendant buying the intoxicating

liquor for his personal use, and it was there judged to be interstate commerce.

In U. S. v. Hill, 248, 420, 63 L. ed. 337, 39 Sup. Ct. 143 the liquor was carried on the person of the defendant from the state of Kentucky into the state of West Virginia, and was intended for personal use, and not for sale, and it was there held to be interstate commerce.

In the *state* of Kirmeyer v. Kansas, 236 U. S. 5, 59 L. Ed. 721, 35 Sup. Ct. 419, Kirmeyer, who lived in Leavenworth, Kansas, operated a liquor business just over the river on the Missouri side, and receiving orders from Leavenworth over the telephone, placed the liquor in his own vehicle, carried it across the river, and there delivered it, was held to be interstate commerce, and the motives were held to be immaterial in that case, although it was adjudged by the state court that the method of conducting the business was a mere sham and fraud upon the state of Kansas, to enable the defendant to carry on a- -legal business in the state of Kansas, in disregard of its laws prohibiting such business. [fol. 102] In what is known as the 'white slave' cases, the jurisdiction in the federal government over the offence depended upon the commerce clause of the Federal Constitution. By the act of June 25, 1910, 36 Stat. at Large 825, chap. 395, U. S. C. title 18, section 397, it was made a criminal offense against the federal government to transport women or girls in interstate commerce for immoral purposes. The statute was upheld as constitutional in Hoke v. U. S. 227, U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, Ahtanasaw v. U. S. 227, U. S. 326, 33 Sup. Ct. 285, 57 L. ed. 528, Bennett v. U. S. 227, U. S. 333, 33 Sup. Ct. 288, 57 L. ed. 531, Harris v. U. S. 227 U. S. 340, 33 Sup. Ct. 289.

In Caminetti v. U. S. 242, U. S. 470, 37 Sup. Ct. 192, 61 L. ed. 442, it was held to be immaterial, in the transportation of the woman in question, that there was no expectation of pecuniary gain, and that the woman was so transported for the purpose only of being the mistress or concubine of the defendant.

See, also, authorities in the case notes to U. S. vs. Simpson, in 10 A. L. R. at page 512; citing U. S. vs. Burch, 226 Fed. 974, where it was held that the transportation of a woman by automobile from one state to another for any

unlawful purpose was interstate commerce. In this opinion, the court said:

"And the transportation of persons has long been held to be commerce. Interstate commerce then is, among other things, the passage of persons and property from one state to another. It does not necessarily, or indeed at all, involve the idea of a common carrier or the payment of freight or fare. Interstate commerce being, therefore, in so far as applicable here, the passage of persons from one state to another, the declaration of the act 'that any person who shall transport any woman in interstate commerce', is equiv- [fol. 103] alent to the declaration 'that any person who shall transport any woman from one state to another.' It was any transportation from state to state, for the purposes mentioned, that Congress intended to prohibit, and did prohibit, and not such transportation by common carrier alone. In these days it is just as easy to transport a woman or girl by automobile as by rail, and the former method may, in many cases, be much more expeditious and clandestine than the latter."

In the case at bar there is no dispute whatever that each and all of the shipments were actually carried from Biloxi to Grants Pass, Louisiana in the original package, and there resold by the consignee to fishing boats operating in the Louisiana marshes. It seems to me so clear that the transaction here involved is interstate commerce, that it is difficult to appreciate the contrary view. The only authority, as I understand the prevailing opinion, relied upon by the majority of the court, is Browning v. Waycross, 233 U. S. 16, 58 L. ed. 829. With due deference to my learned associates, I think that case supports my view, rather than the view of the majority of the court. At pages 19 and 20, 233 U. S. page 831, 58 L. ed. the court said:

"The general principles by which it has been so frequently determined that a state may not burden by taxation or otherwise the taking of orders in one state for goods to be shipped from another, or the shipment of such goods in the channels of interstate commerce *up to and including the consummation by delivery of the goods at the point of shipment* have been so often stated as to cause them to be elementary, and as to now require nothing but a mere outline of the principle." (Italics ours.)

In that case the goods had been shipped and delivered to [fol. 104] the purchaser, but the contract called for in addition to the delivery of the goods at destination, that the seller would place the rods upon the building which they were purchased to serve, and the question is not whether the transportation from the buyer to the seller was interstate commerce, but whether the business of erecting the rods or attaching them to the building was a local business. The court held that it was not an interstate commerce transaction to engage in the business of putting the rods upon the building. Of course, the erecting of buildings, and the placing of fixtures on them, is not a part of interstate commerce, as it is entirely severable and separate therefrom, and becomes a business or occupation.

It seems to me that there is no case at all which supports the prevailing opinion, when the facts established by this record are considered as being in good faith. There is nothing whatever, as I see the record, that establishes, or even tends to establish, bad faith of the parties to the contract, if that is indeed material at all. Contracts are presumed to be legal and valid, and to be entered into honestly, and for the purpose of legitimate business or uses.

[File endorsement omitted.]

[fol. 105] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PETITION FOR APPEAL

To the Honorable Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi and the Presiding Judge thereof:

Your petitioner, the Superior Oil Company, a corporation organized under the laws of the State of Mississippi, and domiciled at Biloxi, Harrison County, Mississippi, defendant in the court below and appellee in this Court, in this its petition for an appeal from final judgment rendered against it by the Supreme Court of the State of Mississippi, respectfully shows unto the Court that upon the 22nd day

of December, 1928, there was rendered against the petitioner a judgment or decree by the Supreme Court of the State of Mississippi, in the sum of Twenty Six Thousand, Nine Hundred Eighty and 72/100 Dollars ($26,980.72) with interest from said date and all costs of court to be taxed; that said judgment rendered by this court against the petitioner is now a final judgment in the Supreme Court of the State of Mississippi, and that the said Supreme Court of the State of Mississippi is the highest court in said State in which a decision in said cause may be rendered; that the Supreme Court of the State of Mississippi is the highest [fol. 106] court of appellate jurisdiction in the State of Mississippi.

Petitioner shows unto the Court that in said suit the petitioner, by its answer in the court below, in its briefs and oral arguments before this court, brought in question the validity of sections 1, 2, and 3, chapter 119 Mississippi Laws 1926, being an amendment of Chapter 115 Mississippi Laws 1924, as being in conflict with and violation of the Constitution of the United States, in that the petitioner and appellee claimed, alleged and asserted in the chancery court of Harrison County, Mississippi, where said cause was originally instituted, and before this court that said Statutes of the State of Mississippi violated clause 3, paragraph 8, Article One of the Constitution of the United States conferring upon the Congress of the United States the sole and exclusive right to regulate commerce among the states, said clause being known as the Commerce Clause of the Constitution of the United States. The decision of the Supreme Court of the State of Mississippi by its said judgment heretofore referred to, rendered upon the 22nd day of December, 1928, was in favor of the validity of the said statutes of the State of Mississippi hereinbefore referred to, and the Supreme Court of the State of Mississippi, by its said judgment or decree, applied and enforced said statutes against this petitioner in said final judgment over the assertion and claim of petitioner that said laws of the State of Mississippi, if so construed and applied, violated the commerce clause of the Constitution of the United States hereinbefore set out.

Your petitioner shows unto the court that in the rendition of said final judgment against said petitioner, certain errors were committed, to the prejudice of your petitioner,

[fol. 107] all of which in detail appear in the assignment of errors herewith filed in this cause.

Wherefore your petitioner feels aggrieved by the final decision and judgment of the Supreme Court of the State of Mississippi, and prays for the allowance of an appeal from the judgment of the Supreme Court of the State of Mississippi as now allowed by law, for the correction therein of the errors complained of, and your petitioner presents herewith an assignment of errors to be presented and argued in the Supreme Court of the United States, and plaintiff in error tenders herewith its formal and duly executed bond, with good and sufficient sureties joining in the execution of said bond, said bond being conditioned according to law, and your petitioner prays the approval of said bond; and that a transcript of the pleas and proceedings therein, duly authenticated, may be forthwith, in accordance with law, sent to the Supreme Court of the United States. Notice thereof has been duly served on Rush H. Knox, Attorney General of the State of Mississippi.

And as in duty bound your petitioner will ever pray.

This the 2nd day of January, 1929.

W. Lee Guice, Wm. H. Watkins, Attorneys for Petitioner, Superior Oil Company.

Notice of foregoing petition for appeal acknowledged.

Rush H. Knox, Attorney General of the State of Mississippi.

[fols. 108-110] Bond on appeal for $35,000 approved; omitted in printing.

[fol. 111] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER ALLOWING APPEAL AND APPROVING BOND

The above entitled matter coming on for hearing upon the petition of Superior Oil Company, for an appeal from final judgment of the Supreme Court of the State of Missis-

sippi, and upon examination of the said petition and the record in said matter, and desiring to give the petitioner opportunity to present in the Supreme Court of the United States the questions presented by the record in the said matter, therefore, it is

Ordered that an appeal with supersedeas from the judgment of the Supreme Court of the State of Mississippi be and is hereby allowed petitioner as allowed by law, and that the appeal bond presented by said petitioner for $35,000.00 be and the same is hereby approved.

This the 8*nd* day of January, 1929.

Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

[fol. 112] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS

Plaintiff in error, Superior Oil Company (appellee in the Supreme Court of the State of Mississippi) a corporation chartered and organized under the laws of the state of Mississippi, would show unto the court in this assignment of error, that there was manifest error prejudicial to it apparent of record in the proceedings, decision and final judgment in the Supreme Court of the State of Mississippi, in the above entitled matter, in this, to wit:

First. The Supreme Court of the state of Mississippi committed error in rendering the final judgment or decree against plaintiff in error, Superior Oil Company, upon the 22nd day of December, 1928, in the abo*f*e entitled cause.

Second. The Supreme court of the state of Mississippi committed error in failing and refusing to affirm the judgment or decree rendered in favor of plaintiff in error herein by the Chancery Court of Harrison county, Mississippi, in said cause.

Third. The Supreme Court of the State of Mississippi committed error in holding that sections 1, 2 and 3, Chapter 119 Mississippi Laws 1926, being an amendment to Chap.

115 Mississippi Laws 1924, were not contrary to and violative of Clause 3, paragraph 8, Art. 1 of the Constitution of the United States, known as the Commerce Clause.

Fourth. The Supreme Court of the State of Mississippi committed error in holding valid and enforcing against plaintiff in error (appellee before the supreme court of the state of Mississippi) Sections 1, 2 and 3 Chap. 119 Mississippi Laws 1926, being an amendment of Chap. 115 Mississippi Laws 1924.

[fol. 113] Fifth. The Supreme Court of the State of Mississippi committed error in so construing Sections 1, 2 and 3, Mississippi Laws of 1926, Chapter 119, being an amendment of Chapter 115, Mississippi Laws of 1924, as to make same applicable to the sales of gasoline made by the Superior Oil Company, plaintiff in error in this cause.

Sixth. The Supreme Court of the State of Mississippi committed error by its judgment or decree against the Superior Oil Company, plaintiff in error herein, in holding that the sales of gasoline in said cause made by the Superior Oil Company are intrastate commerce, and that the Superior Oil Company, plaintiff in error herein, was liable for the gallonage tax therefor provided by Chapter 119, Mississippi Laws of 1926.

Seventh. The Supreme Court of the State of Mississippi committed error in failing and refusing to hold that the sales of gasoline made by the Superior Oil Company, plaintiff in error, were made in interstate commerce.

Eighth. The Supreme Court of the State of Mississippi committed error in sustaining the suggestion of error filed by the appellant, Rush H. Knox, Attorney General of the State of Mississippi, and in setting aside the order of affirmance originally entered.

Ninth. The Supreme Court of the State of Mississippi committed error in failing and refusing to overrule the suggestion of error filed by the appellant, State of Mississippi.

Tenth. For other reasons apparent.

William H. Watkins, W. Lee Guice, Attorneys for Superior Oil Company, Appellee and Plaintiff in Error.

[fol. 114] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

WRIT

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the record and proceedings, and also in the rendition of judgment of a plea which is in the State Supreme Court of the State of Mississippi, before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in said State between Superior Oil Company, plaintiff in error, appellant (appellee before the supreme court of the state of Mississippi) and the State of Mississippi, Ex Rel. Rush H. Knox, Attorney-General, defendant in error, appellee (appellant before the supreme court of the state of Mississippi), wherein was drawn in question the validity of statutes of the state of Mississippi, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of their validity, a manifest error hath happened to the great damage of the said Superior Oil Company, as by its complaint appears.

Wherefore, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, we do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this [fol. 115] writ, so that you have the same in our said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this the 8th day of January,

1929. Done in the City of Jackson, County of Hinds, with the seal of the District Court of the United States for the Southern District of Mississippi, Jackson Division attached.

B. L. Todd, Jr., Clerk of the District Court of the United States for the Southern District of Mississippi, Jackson Division. (Seal U. S. District Court, Southern District of Mississippi.)

Allowed by Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

Formal service of foregoing writ saved and service accepted this January 8th, 1929.

Rush H. Knox, Attorney-General of the State of Mississippi, by James W. Cassedy, Jr., Special Agent.

[fols. 116 & 116½] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 9, 1929

The Clerk of the Supreme Court of the State of Mississippi, in preparing and transmitting the record in the above-entitled cause to the Supreme Court of the United States, will include in the record the following:

(1) Original bill of complaint.

(2) Answer of the Superior Oil Company with exhibits thereto.

(3) Amendment to answer.

(4) Agreement dictated by Mr. Sharp, Tr. 37, and the total out of state deliveries shown in each monthly report of sales, Tr. 37-147.

(5) All the testimony in the case, including agreement of counsel, Tr. 147-174, each inclusive.

(6) Final decree, Tr. 176.

(7) Order affirming decree rendered by the Supreme Court of the State of Mississippi.

(8) Order of the Supreme Court of the State of Mississippi sustaining suggestion of error.

(9) Original opinion, Judge Ethridge affirming cause; opinion of Judge Anderson sustaining suggestion of error; dissenting opinion of Judge Ethridge.

W. H. Watkins, Wm. Lee Guice, Attorneys for Superior Oil Company, Plaintiff in Error.

Service of the foregoing præcipe acknowledged.
Rush H. Knox, Attorney General of the State of Mississippi, by James W. Cassedy, Jr., Special Agent.

[File endorsement omitted.]

[fol. 117] Clerk' certificate to foregoing transcript omitted in printing.

[fols. 118 & 119] Citation in usual form, showing service on Rush H. Knox, omitted in printing.

[fol. 120] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

Stipulation and Addition to Record—Filed in U. S. Supreme Court Feb. 11, 1929

SUPPLEMENTAL SPECIFICATIONS AS TO MATTER TO BE INCLUDED IN THE RECORD

The clerk of the court will include in the record in the Supreme Court of the United States in the above-entitled cause:

(1) Amendment to assignment of error.

(2) Agreement of counsel in respect thereto.

(Signed) W. H. Watkins, Attorneys for the Appellant.

Service acknowledged by copy.

(Signed) Rush H. Knox, Attorney General of the State of Mississippi, by James W. Cassedy, Jr., Special Agent.

[fol. 121] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

STIPULATION—Filed Feb. 1, 1929

It is agreed that the petition for appeal filed by the Superior Oil Company in this case may be treated as having been amended so as to include the objection of appellant, Superior Oil Company, to Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, which were for the months of January, February and March, 1926, involved in the controversy, and were attacked by the Superior Oil Company as violating the Commerce Clause of the Constitution of the United States. Reference to said Act of 1924 having been inadvertently omitted in the petition for appeal, and it is consented that the Superior Oil Company may file an amendment to its assignment of error, including therein its attack upon said Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924.

(Signed) Rush H. Knox, Attorney General of the State of Mississippi, by James W. Cassedy, Jr., Special Agent. Wm. H. Watkins, W. Lee Guice, Attorneys for the Superior Oil Company.

[fol. 122] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

AMENDMENT TO ASSIGNMENT OF ERRORS—Filed Feb. 1, 1929

Plaintiff in error, Superior Oil Company (appellees in the Supreme Court of the State of Mississippi), a corpora-

tion chartered and organized under the laws of the State of Mississippi, would show unto the Court in this amendment to assignment of error, that there was manifest error prejudicial to it apparent of record in the proceedings, decision and final judgment in the Supreme Court of the State of Mississippi, in the above-entitled matter, in this, to-wit:

First. The Supreme Court of the State of Mississippi committed error in rendering the final judgment or decree against plaintiff in error, Superior Oil Company, upon the 22nd day of December, 1928, in the above-entitled cause.

Second. The Supreme Court of the State of Mississippi committed error in failing and refusing to affirm the judgment or decree rendered in favor of plaintiff in error herein by the Chancery Court of Harrison County, Mississippi, in said cause:

Third. The Supreme Court of the State of Mississippi committed error in holding that Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, were not contrary to and violative of Clause 3, Paragraph 8, Article 1 of the Constitution of the United States, known as the Commerce Clause.

Fourth. The Supreme Court of the State of Mississippi committed error in holding valid and enforcing against [fol. 123] plaintiff in error (appellee before the Supreme Court of the State of Mississippi) Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924.

Fifth. The Supreme Court of the State of Mississippi committed error in so construing Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, as to make same applicable to the sales of gasoline made by the Superior Oil Company, plaintiff in error in this case.

Sixth. The Supreme Court of the State of Mississippi committed error by its judgment or decree against the Su-

perior Oil Company, plaintiff in error herein, in holding that the sales of gasoline in said cause made by the Superior Oil Company are intrastate commerce, and that the Superior Oil Company, plaintiff in error herein, was liable for the gallonage tax therefore provided by Chapter 119, Mississippi Laws of 1926, and Chapter 115, Mississippi Laws of 1924.

Seventh. The Supreme Court of the state of Mississippi committed error in failing and refusing to hold that the sales of *t*asoline made by the Superior Oil Company, plaintiff in error, were made in interstate commerce.

Eighth. The Supreme Court of the State of Mississippi committed error in sustaining the suggestion of error filed by the appellant, Rush H. Knox, Attorney General of the State of Mississippi, and in setting aside the order of affirmance originally entered.

Ninth. The Supreme Court of the State of Mississippi committed error in failing and refusing to overrule the suggestion of error filed by the appellant, State of Mississippi.

Tenth. For other reasons apparent.

(Signed) Wm. H. Watkins, W. Lee Guice, Attorneys for Superior Oil Company, Appellee and Plaintiff in Error.

[File endorsement omitted.]

[fol. 124] Clerk's certificate to foregoing papers omitted in printing.

[fol. 124½] [File endorsement omitted.]

[fol. 125] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY PLAINTIFF IN ERROR AND DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED—Filed Jan. 28, 1929

The Superior Oil Company, appellant in the above-entitled cause, in order to secure a reversal of the judgment appealed from, will rely upon the following points:

(1) That the sales of gasoline made by the Superior Oil Company, Plaintiff in Error, for which tax was recovered in this case, were made in interstate commerce, and Plaintiff in Error was not liable for the tax thereupon.

(2) That Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, as construed and enforced by the Supreme Court of the State of Mississippi in the final judgment appealed from against the Plaintiff in Error, violate Clause 3, Paragraph 8, Article 1, of the Constitution of the United States, conferring upon the Congress of the United States the sole and exclusive right to regulate commerce among the States, said clause being known as the Commerce Clause of the Constitution of the United States.

(3) The excise law, imposed Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, can not, under the Commerce Clause of the Constitution of the United States, be made applicable to the sales of gasoline made by the Plaintiff in Error, for which the tax was recovered against the Plaintiff in Error in this case in the final judgment of the Supreme Court of the State of Mississippi appealed from.

(4) Other points to be presented at the hearing.

[fol. 126] Designation of Portions of the Record to be Printed

The Clerk of this Court will print the entire record in the above-entitled cause transmitted from the Supreme Court of the State of Mississippi.

W. H. Watkins, W. Lee Guice, Attorneys for the Plaintiff in Error.

We, the undersigned attorneys for the appellee, consent to the foregoing designation of the parts of the record to to be printed.

E. C. Sharp, James W. Cassedy, Jr., Attorneys for the Appellee.

[fol. 127] [File endorsement omitted.]

Endorsed on cover: File No. 33,951. Mississippi Supreme Court. Term No. 642. Superior Oil Company, appellant, vs. The State of Mississippi ex rel. Rush H. Knox, Attorney General. Filed January 21st, 1929. File No. 33,951.

FILE COPY

No. 28

Office Supreme Court
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CHARLES ELMORE

In the Supreme Court of the United States

October Term 1928

THE SUPERIOR OIL COMPANY, Appellant

vs.

STATE OF MISSISSIPPI, ex rel.
RUSH H. KNNOX, Attornty General.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OF JURISDICTION

W. H. WATKINS,
W. LEE GUICE.
Attorneys for Appellant.

In the Supreme Court of the United States

October Term 1928

No. 642

THE SUPERIOR OIL COMPANY, Appellant

vs.

STATE OF MISSISSIPPI, ex rel.
RUSH H. KNOX, Attorney General.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OF JURISDICTION

Appellant submits, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, the following statement of the basis of this Court's jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of Mississippi.

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925, chapter 229, 43 Stat. 937, being section 344, Judicial Code, U. S. Code, Ann., title 28.*

B.

DATE OF JUDGMENT AND DATE OF APPLICATION FOR APPEAL.

The Decree of the Supreme Court of the State of Mississippi reversing the Decree of the Chancery Court of Harrison County, Mississippi, was entered on December 22nd, 1928 (R. 85).

The application for the appeal was presented January 2, 1929 (R. 105-107). The appeal was allowed on the 8th day of January, 1929 (R. 111).

C.

NATURE OF THE CASE AND RULINGS BELOW.

Section 2, Chapter 115, Mississippi Laws 1924 amending Section 2, Chapter 116, Mississippi Laws 1922 is as follows:

> "Sec. 2. Any person engaged in business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of three cents (3c) per gallon upon the sale of gasoline by such dealer in this state, except, however, such gasoline as is brought into this state and sold in original packages or otherwise in inter-state commerce, or such as is purchased outside of the state and brought into this state in original packages, or otherwise by the consumer for his own use shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer.

*All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State and on file with the Clerk of this Court. The record has not yet been printed.

"Nor shall the distributor pay such tax when the same is paid by the retailer."

Section 2, Chapter 119, Mississippi Laws of 1926 is as follows:

"Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4c) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer."

Section 3, Chapter 119, Mississippi Laws, 1926 is as follows:

"Sec. 3. This act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this state to another state or nation, nor to require the inclusion in the measure of tax any gasoline shipped in interstate commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another state or person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this state. Provided, that distributors making shipments of gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the state auditor of public accounts."

The State of Mississippi, through its Attorney General, filed suit in the Chancery Court of Harrison County, Mississippi to recover the tax provided in said Acts on gasoline sold by the appellant, (R. 3-8). The appellant, in its answer

claimed that the sales of gasoline made by it sought to be recovered in the suit consisted of shipments of gasoline made by appellant from the State of Mississippi into the State of Louisiana, and brought in controversy the above statutes, if applicable to said sales, as being in violation of the Commerce Clause of the Constitution of the United States (R. 12-17). The decision of the Chancery Court of Harrison County, Mississippi was in favor of the appellant and against the validity of the Act as applied to the sales made by appellant (R. 72). On appeal to the Supreme Court of the State of Mississippi by the State of Mississippi, the case was heard before Division B, and the judgment of the court below declaring the Acts invalid as to the sales in question was affirmed (R. 74). Opinion delivered by Ethridge, J. (R. 75-83). On suggestion of error the cause was remanded for re-argument before Division A (R. 83-84) upon the 22nd day of December, 1928, judgment was rendered setting aside the judgment entered in the court below, and sustaining the validity of the Acts of the Mississippi Legislature referred to and entering a judgment against the appellant for taxes sought to be recovered (R. 85). Opinion of the court, Anderson, J. (R. 86-95), dissenting opinion (R. 96-104). The effect of the judgment rendered by the Supreme Court of the State of Mississippi, appealed from, was a decision in favor of the validity of the Acts of the Mississippi State Legislature involved, against the assertion of the appellant of their invalidity as being in violation of the Commerce Clause of the Constitution of the United States.

D.

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Respectfully submitted,

W. H. WATKINS,

W. LEE GUICE.

Attorneys for Appellant.



FILE COPY

SEP 16 192
CHARLES ELMORE C

Supreme Court of the United States

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY, Appellant,

v.

STATE OF MISSISSIPPI EX REL RUSH H. KNOX, Attorney General

No. 28.

STATEMENT AND BRIEF FOR THE APPELLANT.

WILLIAM H. WATKINS,
W. LEE GUICE,
JOHN L. HEISS,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY, Appellant

vs.

STATE OF MISSISSIPPI

ex rel RUSH H. KNOX, Attorney General

No. 28.

STATEMENT AND BRIEF FOR THE APPELLANT

STATEMENT

Official Report 119 So. 360.

The Superior Oil Company, appellant, a Mississippi corporation, domiciled at Biloxi, Mississippi, during the years 1926 and 1927 conducted at its domicile a distributing station for the sale of petroleum products. At Biloxi there are located a number of manufacturing plants where raw shrimp and oysters are packed for commercial purposes. The supply of shrimp and oysters is obtained from the Louisiana marshes east of the Mississippi River contiguous to the Gulf of Mexico. The shrimp are taken from the waters and the oysters from the reefs by boats which are propelled by gasoline, by seamen who are referred to in this case as fishermen. They sell their output almost exclusively to packers in Biloxi, Mississippi; de-

liveries are made to the packers by fishermen in Louisiana waters and are transported in the boats of the packers to Biloxi. Grants Pass, a point in the Gulf of Mexico within the state of Louisiana, is a harbor or roadstead which forms the base of operations for fishermen engaged in catching shrimp and taking oysters. It is the point at which, under the laws of the state of Louisiana, fishermen are licensed and their operations are carried on from this place. In order to procure the necessary gasoline to operate their boats, the fishermen contract with the packers at Biloxi, Mississippi, to obtain for them at Biloxi, Mississippi, the supply of gasoline required and to transport the same to the fishermen at Grants Pass in the state of Louisiana. The Superior Oil Company is under contract with the packers to supply the requirements of these fishermen. It obtains gasoline in tank car lots from beyond the state of Mississippi, stores the same in its own private tanks, a portion of which is used in local sales at Biloxi. A large supply, however, is always kept on hand to supply the requirements of the fishermen in the Louisiana marshes. A fisherman desiring gasoline would, in due course of business, notify one of the packers at Biloxi, Mississippi, to obtain for him a stated amount of gasoline. The packer would place an order with the appellant, Superior Oil Company, for an amount equal to the requirements of the fisherman. The Superior Oil Company would draw the gasoline from its tank into fifty gallon drums. The same being sealed were delivered to the master of the packer's boat, consigned to the packer at Grants Pass, Louisiana. The form of receipt issued by the master of the boat was as follows:

"No. 4882 Biloxi, Miss., 12/20/1927

"Received in good order and condition from Superior Oil Company, Biloxi, Miss.

No. Pieces	Description of Articles	Weight
2 drums gasoline		

"Consigned to Gussie Fontaine Pkg. Co., destination Grant's Pass, La., by boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co. The master of said boat, Frank Louis, acknowledges receipt of said goods and agrees to deliver merchandise as consigned in like order and condition.

"It is further understood and agreed that the property consigned herein remains the property of the said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination, but that all due caution and carefulness will be exercised by master and crew of said boat Frank Louis to protect said property and effect a safe delivery without undue delay.

"In consideration of the packet rate charged for carrying the property described herein the owners of this boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit caused by carelessness or negligence, this damage and loss shall be sustained by owners of boat accepting this shipment.

"366-537 (signed) Joseph Adams
"Master of Boat Frank Louis.

"Received $----------collect--to supply in prepayment of packet charges, on property hereon described from Biloxi, Miss., to Grant's Pass, La. For Master of Boat."

Delivery was made to the packer's boat at the wharf in Biloxi at the water's edge of the Mississippi Sound. The appellant charged the gasoline to the packer with whom the order was placed by the fisherman. The boat transported the gasoline to Grant's Pass and there delivered it to the fisherman who had ordered the same. The whole voyage of the gasoline being continuous from the plant of the oil company until delivery in Louisiana. The packer would settle with the

appellant monthly for the gasoline thus purchased, and, in turn, the packer collected from the fisherman. The amount of gasoline ordered by the packer from the appellant corresponded in every respect with the order placed by the fisherman with the packer. The fishermen in the Louisiana marshes, in carrying on their operations of catching shrimp and taking oysters were entirely dependent upon this source for their supply of gasoline. The appellant was under contract with the packers to carry a sufficient quantity of gasoline to supply the requirements of the business. There were over 100 boats in the Louisiana marshes engaged in catching shrimp and taking oysters, selling the same to Biloxi packers, and the Biloxi packers operated approximately 100 boats in transporting shrimp and oysters from the Louisiana waters to the packing plants at Biloxi, Mississippi. The packers, in purchasing the gasoline, intended the same to be shipped to Grant's Pass to supply the needs of the fishermen and for no other purpose, and the appellant, in filling orders, knew that the same was intended to go to Grant's Pass, La., and for no other purpose. The facts in respect thereto, as shown by the record were undisputed. Testimony of F. B. Royster (R. 31); L. O. Johnson (R. 44). While this testimony related to the associations of certain packers, the record contains the stipulation that the course of business was the same as to each sale (R. 51).

The volume of this business, as above outlined, constituted a well-established current of interstate commerce. The volume of business appears R. 17-30. The same extended over a period of approximately two years throughout the years from the first of January, 1926, and comprised approximately 1,000 sales of an aggregate value in excess of $500,000.

Section 2, Chapter 115, Mississippi Laws 1924 amending Section 2, Chapter 116, Mississippi Laws 1922 is as follows:

> "Sec. 2. Any person engaged in business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of three cents (3c) per gallon upon the sale of gasoline by

such dealer in this state, except, however, such gasoline as is brought into this state and sold in original packages or otherwise in interstate commerce, or such as is purchased outside of the state and brought into this state in original packages, or otherwise by the consumer for his own use shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer.

"Nor shall the distributor pay such tax when the same is paid by the retailer."

Section 2, Chapter 119, Mississippi Laws of 1926 is as follows:

"Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4c) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer."

Section 3, Chapter 119, Mississippi Laws, 1926, is as follows:

"Sec. 3. This act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this state to another state or nation, nor to require the inclusion in the measure of tax any gasoline shipped in interstate commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another state or person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this state. Provided, that distributors making shipments of

gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the state auditor of public accounts."

The appellant paid taxes to the state of Mississippi on all gasoline sold by it for purely domestic purposes at Biloxi, Mississippi, but took the position that as to the gasoline shipped to Grant's Pass, La., the transactions were interstate commerce, and such sales were not subject to state taxation. The state of Mississippi, through its attorney-general, filed suit in the chancery court of Harrison County, Mississippi, to recover the gasoline tax provided in said acts (R. 1-4).

The appellant, in its answer, denied liability therefor and claimed that the shipments were in interstate commerce, and that the Mississippi statutes taxing the sales of gasoline were unconstitutional and violative of the commerce clause of the constitution of the United States, if applicable to the sales in question (R. 12). The case was submitted on the pleadings and evidence hereinbefore set out, and the judge of said court held that the sales were in interstate commerce and not subject to taxation, and a final decree was entered dismissing the bill of complaint filed by the state of Mississippi, the decree being dated Feb. 7, 1928 (R. 51). An appeal was taken by the state of Mississippi to the supreme court of the state, and was submitted to Division B thereof composed of three judges. On June 11, 1928, the supreme court of the state of Mississippi affirmed the decree of the chancery court of Harrison County, Mississippi, dismissing the original bill of complaint (R. 52). The opinion was delivered by Mr. Justice Ethridge (R. 53), in which the following language was used:

"The decision of this case will turn upon the question whether this transaction constitutes interstate commerce.

"In the case of **United States v. Simpson,** 252 U. S. 465, 64 L. ed. 665, 45 S. C. 364, 10 A. L. R. 510, the Su-

preme Court of the United States held that, the transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, par. 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

"The indictment in that case charged that the defendant, being in the city of Cheyenne, Wyoming, 'bought, paid for, and owned,' 5 quarts of whiskey, and thereafter in his own automobile, driven by himself, transported it into the city of Denver, Colorado, intending there to devote it to his own personal use. Colorado prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes. The court decided that this transaction constituted interstate commerce within the meaning of such Act.

"There was a similar holding in the case of **United States v. Hill**, 248 U. S. 420, 63 L. ed. 337, 39 Sup. Ct. 143. In that case the indictment charged that Hill, on the 20th of November, 1917, being in the state of Kentucky, there intended to go and be carried by means of a common carrier, engaged in interstate commerce, from the state of Kentucky into the state of West Virginia, and intended to carry upon his person, as a beverage, for his personal use, a quantity of intoxicating liquor, to wit, one quart thereof, into the state of West Virginia, and did in the State of Kentucky purchase and procure a quantity of intoxicating liquor, to wit, one quart thereof, contained in bottles, and did then and there board a certain trolley car being operated by a common carrier corporation engaged in interstate commerce, and by means thereof did cause himself and the said intoxicting liquor, than upon his person, to be carried and transported in interstate commerce into

the state of West Virginia. It is charged that this was done in violation of the Act of Congress approved March 3, 1917, commonly known as the Reed Amendment, and that the transaction constituted interstate commerce."

A suggestion of error being filed by the state of Mississippi, the case was submitted for re-argument before Division A of the supreme court of the state of Mississippi, on November 12, 1928 (R. 59). The case was then determined by the full court consisting of six judges. An opinion was rendered December 22, 1928, reversing the judgment of affirmance theretofore had by the supreme court of the state of Mississippi, and entering a decree against the appellant for the statutory tax on the gasoline as shown by the proof in the case (R. 60). The opinion was delivered by Mr. Justice Anderson (R. 61), and will be found reported: **State ex rel Knox, Attorney-General v. Superior Oil Co.,** 119 So. 360. Judge Anderson used the following language:

"The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grant's Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and purchase of gasoline between the appellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline as set out in the bills of lading therefor issued by the boat masters of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were

issued by the purchasers of the gasoline themselves, the packers, or to be more specific, by the masters of their boats, which amounted to the same thing."

Judge Anderson also used the following language:

"We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another state. It is much more difficult when the purchaser retains control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidentially on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out. It is true that the mere power of a shipper to divert a shipment already begun does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith, nor does a temporary interruption of the passage when reasonable and in furtherance of the intended transportation. **Hughes v. Minnesota,** 272 U. S. 468, 71 L. ed. 259; **Champlain Realty Company v. Brattleboro,** 260 U. S. 364, 67 L. ed. 309; **Railroad Company v. Mims** 111 Miss. 574, 71 So. 827. In **Browning v. Waycross, 233** U. S. 16, 58 L. ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a non resident manufacturer of such rods in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license without violating the commerce clause of the Federal Constitution, although such contracts bound the seller, at his own expense, to at-

tach them to the houses of the persons who ordered them. The court further held in that case that it was not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause'."

Judge Ethridge delivered a dissenting opinion (R. 68) concurred in by Mr. Justice Cook, which will be found 119 So. 363, using in part the following language:

"In **Dahnke-Walker Milling Co. v. C. T. Bondurant,** 257 U. S. 282, 66 L. ed. 239, the court expressly held that where goods are purchased in one state for transportation to another, the purchase is interstate commerce, quite as much as the transportation. In the opinion (257 U. S. 290, L. ed. 243), the court said:

" 'The commerce clause of the constitution, art. 1, sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. **Brown v. Maryland,** 12 Wheat, 419, 446, 447, 6 L. ed. 678, 688, 689; **American Steel & Wire Co. v. Speed,** 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. **American Exp. Co. v. Iowa,** 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the com-

merce clause. Thus it was said in **Welton v. Missouri**, 91 U. S. 275, 280, 23 L. ed. 347, 349: "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities: In **Kidd v. Pearson**, 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it is tersely said: "Buying and selling and the transportation incidental thereto constitute commerce." In **U. S. v. E. C. Knight Co.**, 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, "contracts to buy, sell or exchange goods to be transported among the several states" were declared "part of interstate trade or commerce." And in **Addyston Pipe and Steel Co. v. U. S.** 175 U. S. 211, 241, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states and includes not only the transportaion of persons and propery and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities." In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last'."

SPECIFICATION OF ERRORS INTENDED TO BE URGED

First. The Supreme Court of the State of Mississippi committed error in rendering the final judgment or decree against plaintiff in error, Superior Oil Company, upon the 22nd day of December, 1928, in the above-entitled cause.

Second. The Supreme Court of the State of Mississippi committed error in failing and refusing to affirm the judgment or decree rendered in favor of plaintiff in error herein by the Chancery Court of Harrison County, Mississippi, in said cause.

Third. The Supreme Court of the State of Mississippi committed error in holding that Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, were not contrary to and violative of Clause 3, Paragraph 8, Article 1 of the Constitution of the United States, known as the Commerce Clause.

Fourth. The Supreme Court of the State of Mississippi committed error in holding valid and enforcing against plaintiff in error (appellee before the Supreme Court of the State of Mississippi) sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115 Mississippi Laws of 1924.

Fifth. The Supreme Court of the State of Mississippi committed error in so construing Sections 1, 2 and 3, Chapter 119, Mississippi Laws of 1926, being an amendment to Chapter 115, Mississippi Laws of 1924, and Sections 1, 2 and 3, Chapter 115, Mississippi Laws of 1924, as to make same applicable to the sales of gasoline made by the Superior Oil Company, plaintiff in this case.

Sixth. The Supreme Court of the State of Mississippi committed error by its judgment or decree against the Superior Oil Company, plaintiff in error herein, in holding that the sales of gasoline in said cause made by the Superior Oil Company are intrastate commerce, and that the Superior Oil Company, plaintiff in error herein, was liable for the gallonage tax therefore provided by Chapter 119, Mississippi Laws of 1926, and Chapter 115, Mississippi Laws of 1924.

ARGUMENT

POINT I.

Jurisdiction

The appellant has heretofore complied with paragraph one rule twelve of this court by filing a statement of jurisdiction, with list of authorities sustaining the same.

In this case the appellant brought in question the constitutionality of the Mississippi statutes under review, by the assertion that such statutes violated the commerce clause of the constitution of the United States, if susceptible to construction that they required or justified the imposition of the tax therein provided on the sales of gasoline made by the appellant under the facts and circumstances disclosed in this case. The decision of the supreme court of the state of Mississippi was in favor of the validity of the act and applied and enforced the same as against the appellant.

The following authorities sustain the jurisdiction of the court:

Peoples of the State of New York v. Zimmerman, _____ U. S._____ 73 L. ed. 52; **Harold B. Fiske vs. State of Kansas,** 274 U. S. 380, 71 L. ed. 1108; **Di Santo v. Pennsylvania,** 273 U. S. 34, 71 L. ed. 524; **Peoples Nat. Gas Co. v. Public Service Com.,** 270 U. S. 550, 70 L. ed. 726; **Kansas City So. Ry. Co. v. Road Improvement Dist.** 266 U. S. 379, 69 L ed. 335; **Shafer v. Grain Co.** 268 U. S. 189, 69 L. ed. 909; **Eureka Pipe Line Co. v. Hallanan,** 257 U. S. 265, 66 L. ed. 227; **Dahnke-Walker Milling Co. v. Bondurant,** 257 U. S. 282, 66 L. ed. 239; **Lemke v. Farmers' Grain Co.** 258 U. S. 50, 66 L. ed. 458; **Kenney v. Sup. Lodge,** 252 U. S. 411, 64 L. ed. 638; **Wagner v. Covington,** 251 U. S. 95, 64 L. ed. 157; **Penn Gas Co. v. Public Service Com.,** 252 U. S. 23, 64 L. ed. 43; **U. S. v. Simpson,** 252 U. S. 465; 64 L. ed. 665; **Kansas City Steel Co. v. State of Arkansas,** 269 U. S. 148, 70 L. ed. 204; **William Truax et al v. Corrigan,** 257 U. S. 312, 66 L. ed. 254; **Standard Oil Co. v. Graves,** 249 U. S. 389, 63 L. ed.

662; **U. S. v. Hill**, 248 U. S. 420, 63 L. ed. 337; **Western Union Tel. Co. v. Public Service Com.**, 247 U. S. 105, 62 L. ed. 1006; **Western Union Tel. Co. v. Lipscomb**, 244 U. S. 346, 61 L. ed. 118; **Penn. R. R. Com. v. Sonman Shaft Coal Co.** 242 U. S. 120, 61 L. ed. 188; **Rossi v. Pennsylvania**, 238 U. S. 62, 59 L. ed. 1201; **Kirmeyer v. Kansas**, 236 U. S. 568, 59 L. ed. 721; **Texas & N. O. Ry. Co. v. Sabine Tram Co.** 227 U. S. 111, 57 L. ed. 443; **Hanley v. Kansas City So. Ry. Co.**, 187 U. S. 617, 47 L. ed. 333; **American Express Co. v. Iowa**, 196 U. S. 133, 49 L. ed. 417; **Hannibal Ry. Co. v. Husen**, 95 U. S. 465, 24 L. ed. 427; **Philadelphia Ry. Co. v. Pennsylvania**, 82 U. S. 232, 20 L. ed. 146.

POINT II.

This Court will examine the record and determine for itself whether or not the Mississippi statutes complained of, as construed and enforced by the supreme court of the state of Mississippi, burden interstate commerce.

In the case of **A. & V. Ry Co. v. J. & E. Ry. Co.**, 271 U. S. 244, 70 L. ed. 928, the court used the following language:

> "It is true that in this case the state court found that the place selected for the junction was a proper one. But the power to make the determination whether state action will obstruct interstate commerce inheres in the United States as an incident to its power to regulate such commerce."

In the case of **K. C. Structural Steel Co. v. State of Arkansas**, 269 U. S. 148, 70 L. ed. 204, the court used the following language:

> "The supreme court of Arkansas held that the things done by plaintiff in error before August 17, 1921, constituted intrastate business in Arkansas. But the plaintiff in error contends that all was interstate commerce. We accept the decision of the supreme court of Arkansas as to what constitutes the doing of business in that state

within the meaning of its own laws. **Georgia v. Chattanooga,** 264 U. S. 472, 483, 68 L. ed. 796, 800, 44 Sup. Ct. Rep. 369. But this court will determine for itself whether what was done by plaintiff in error was interstate commerce and whether the state enactments as applied are repugnant to the commerce clause. Plaintiff in error cites **Dahnke-Walker Mill v. Bondurant,** 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106. It was there held that, 'Such commerce (among the states) is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse.' (p. 290) and that, 'A corporation of one state may go into the latter, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause' (p. 291). In that case, a Tennessee corporation, in pursuance of its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purpose of wheat to be delivered in Kentucky on the cars of a public carrier, intending to forward it as soon as delivery was made. It was held that the transaction was interstate commerce, notwithstanding the contract was made and was to be performed in Kentucky. All the things done in Kentucky had reference to and were included in the interstate transaction."

In **LaCoste v. Department of Conservation,** 263 U. S. 545, 68 L. ed. 437, this court used the following language:

"This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form. **Looney v.**

Crane Co., 245 U. S. 178, 189 et seq. 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; **Kansas City Ft. S. & M. R. Co. v. Botkin** 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261; **St. Louis Southwestern R. Co. v. Arkansas**, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99; **U. S. Exp. Co. v. Minnesota**, 223 U. S. 335, 346, 56 L. ed. 459, 465, 32 Sup. Ct. Rep. 211; **Galveston H. & S. A. R. Co. v. Texas**, 210 U. S. 217, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

Other authorities are **Interstate Amusement Co. v. Albert**, 239 U. S. 560, 60 L. ed. 439; **Truax v. Corrigan**, 257 U. S. 312, 66 L. ed. 254, **Fiske v. Kansas**, 274 U. S. 380, 71 L. ed. 1108.

POINT III.

A state cannot, under the commerce clause of the constitution of the United States, tax interstate commerce in any form.

Brown v. Maryland, 12 Wheat, 420, 6 L. ed. 678; **Philadelphia R. R. Co. v. Pennsylvania**, 82 U. S. 232, 21 L. ed. 146; **Western Union Tel. Co. v. Texas**, 105 U. S. 460, 26 L. ed. 1067; **Moran v. City of New Orleans**, 112 U. S. 69, 28 L. ed. 653; **Gloucester Ferry Co. v. Pennsylvania**, 114 U. S. 196, 29 L. ed. 158; **Crutcher v. Kentucky**, 141 U. S. 47, 35 L. ed. 649; **Galveston Ry. Co. v. Texas**, 210 U. S. 217, 52 L. ed. 1031; **Western Union Tel. Co. v. Kansas**, 216 U. S. 1, 54 L. ed. 355; **Crenshaw v. State**, 227 U. S. 389, 57 L. ed. 565; **Rogers v. Arkansas**, 227 U. S. 401, 57 L. ed. 569.

The latest case upon the subject is that of **Helson et al v. Commonwealth of Kentucky**_____U. S._____, 73 L. ed. 337, decided April 8, 1929.

POINT IV.

The sale and delivery of gasoline by appellant in this case, according to the established course of dealing, was in a regular channel of interstate commerce, and formed an integral part thereof.

A.

What Constitutes Interstate Commerce

In the case of **William Adair v. U. S.** 208 U. S. 161, 52 L. ed. 436, the court used the following language:

> "Let us inquire what is commerce, the power to regulate which is given to Congress?
>
> "This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the teansit of persons, and the transmission of messages by telegraph,—indeed every species of commercial intercourse among the several states, —but not that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states'."

In Note, **U. S. v. Simpson,** 252 U. S. 465, 64 L. ed. 665, 10 A. L. R. 512, the following rule is announced:

> "There are two elements involved in the idea of commerce, viz., trade and transportation. Commerce has been defined to be 'a term of the largest import. It comprehends intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities, between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted.' **Welton v. Missouri** (1876) 91 U. S. 275, 23 L. ed. 347. The United States Supreme Court, speaking of interstate commerce, says that 'commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and

transit of persons and property as well as the purchase and sale and exchange of commodities.' **Mobile County v. Kimball** (1881) 102 U. S. 691, 26 L. ed. 238. Again, it has been stated that 'commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.' **Gloucester Ferry Co. v. Pennsylvania** (1885) 114 U. S. 196, 29 L. ed. 158, 1 Inter. Com. Rep. 382, 5 Sup. Ct. Rep. 826."

B

Interstate Commerce Comprises not only Shipments but Negotiations and Contracts in Respect thereto.

In the case of **Dahnke-Milling Co. v. Bondurant,** 257 U. S. 282, 66 L. ed. 239, the plaintiff went into the State of Kentucky and made a contract with a citizen of the latter state, whereby the citizen of Kentucky was to prepare and deliver, f.o.b. cars in Kentucky, certain grain to be shipped to the plaintiff in the State of Tennessee. There was a breach of the contract, and the plaintiff, the purchaser, filed suit for damages. The state court held that the failure of the plaintiff corporation to file a copy of its charter, as required by the Kentucky statutes, rendered the contract unenforceable. The Supreme Court of the United States held that the act of buying in the State of Kentucky was a step in interstate commerce and the state statute was void, using the following language:

"Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. **Brown v. Maryland,** 12 Wheat. 419, 446, 6 L. ed. 678, 688, 689;

American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principal, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as often as it does the transportation. **American Exp. Co. v. Iowa,** 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus, it was said in **Walton v. Missouri,** 91 U. S. 275, 23 L. ed. 347, 349: 'Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities.' In **Kidd v. Pearson,** 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In **U. S. v. E. C. Knight Co.** 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, 'Contracts to buy, sell or exchange goods to be transported among the several states' were declared 'part of interstate trade of commerce.' And in **Addyston Pipe & Steel Co. v. United States,** 174 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 95, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, and also, the purchase, sale and exchange of commodities. In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

The direct question was presented in the case of **Lemke v. Farmers' Grain Co.,** 258 U. S. 50, 66 L. ed. 458. In that case,

the defendants in error were operating a series of grain elevators in the state of North Dakota, where grain was produced with a view to being resold. A small portion thereof was sold in the state of North Dakota, but the greater portion thereof was sold and shipped out of the state. The state of North Dakota passed an act regulating the operation of the state elevators. An injunction was obtained in the United States court on the ground that the act was an interference with interstate commerce. The Federal court in North Dakota so held, and the supreme court of the United States sustaining the decree, used the following language:

> "That such course of dealing constitutes interstate commerce, there can be no question. The court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. **Dahnke & Walker Mill Co. v. Bondurant,** decided Dec. 12, 1921, (257 U. S. 282, ante, 239, 43 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into the state of Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the state. The court rejected the conclusion of the state court, and held that the buying, no less than the selling, was a part of interstate commerce, committed to national control by the federal constitution. Applying the principle of that decision, and the previous decisions in this court, cited in the opinion, the complaint's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect of control and burden interstate commerce."

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between a definition of interstate commerce, where the right of state taxation was involved, or manufacture or commerce of an interstate character was subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. **Swift & Co. v. U. S.** 196 U. S. 376, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; **Eureka Pipe Line Co. v. Hallanan** decided by this court Dec. 12, 1921, (257 U. S. 265, ante, 227, 42 Sup. Ct. Rep. 101); and **U. S. Fuel Co. v. Hallanan,** decided the same day, (257 U. S. 277, ante, 234, 42 Sup. Ct. Rep. 105)."

In the case of **Rosenberger v. Pacif. Exp. Co.,** 241 U. S. 48, 60 L. ed. 880, the court used the following language:

"But we think it is a sufficient answer to say that the reasoning referred to rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning and as enforced in a line of decisions of this court beginning with the very birth of the constitution, and which in its fundamental aspect

has undergone no change or suffered no deviation; that is, that the interstate commerce which is subject to the control of congress embraces the widest freedom, including, as a matter of course, the right to make all contracts having a proper relation to the subject."

In the case of **Federal Trade Commission v. Pacific States P. T. Asso.**, 273 U. S. 52, 71 L. ed. 534 the court used the following language:

"The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' **Swift & Co. v. United States,** 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. **Dozier v. Alabama,** 218 U. S. 124, 128, 54 L. ed. 965, 967, 28 L. R. A. (n. s.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. **Dahnke-Walker Mill. Co. v. Bondurant,** 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Lemke v. Farmers' Grain Co.,** 258 U. D. 50, 55, 66, L. ed. 458, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser

from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. **Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling)** 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. **Dozier v. Alabama,** supra; **Western U. Teleg. Co. v. Foster,** 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A. L. R. 1278; P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; **Lemke v. Farmers Grain Co.** supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

In the case of **Foster Fountain Packing Co. v. Haydel,** --------U. S.---------, 73 L. ed. 1, the court used the following language:

"In determining what is interstate commerce, courts look to practical considerations and the established course of business. **Swift & Co. v. United States,** 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; **Lemke v. Farmers Grain Co.,** 258 U. S. 50, 59, 66 L. ed. 458, 42 Sup. Ct. Rep. 244; **Binderup v. Pathe Exch.,** 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96; **Shafer v. Farmers Grain Co.,** 268 U. S. 189, 198, 200, 69 L. ed. 909, 914, 915, 45 Sup. Ct. Rep. 481. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among the states. And a state statute that operates directly to burden any of its essential elements is invalid. **Dahnke-Walker Mill Co. v. Bondurant,** 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Shafer v. Farmers Grain Co.,** supra; 199 (69 L. ed. 914, 45 Sup. Ct. Rep. 481).

C

Interstate Commerce not dependent upon passage of title, neither does the same necessarily involve transportation by carrier.

Judge Anderson, who delivered the majority opinion for the supreme court of the state of Mississippi (119 Sou. 361), used the following language:

> "The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grant's Pass, in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and the purchase of gasoline between the appellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline, as set out in the bills of lading therefor issued by the boat master of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing."

It is perfectly apparent that the supreme court of the state of Mississippi, in the majority opinion, was of the opinion that the question of whether or not the transactions involved were interstate commerce turned upon the question of passage of title. Such conception totally overlooked the principles underlying interstate commerce. The position of the supreme

court of the state of Mississippi is based upon the hypothesis that interstate commerce includes only the transportation and completely leaves out of account the fact that interstate commerce protected the negotiations leading up to the sales, and the sales themselves. The tax sued for and recovered in this case is not one laid upon the privilege of conducting a business within the state of Mississippi such as was involved in **Browning v. Waycross**, 233 U. S. 16, 58 L. ed. 829. The tax in this case was one imposed upon each separate sale itself. There could be no sale without a contract of purchase, and the negotiations, as well as the contract of purchase, were just as much part of interstate commerce as the transportation itself.

There are two viewpoints from which interstate commerce must be determined. One view is commerce coming into a state. The authorities are well settled that when property is stored or comes to rest and forms a part of the property of the state, its interstate character is at an end, and the property is subject to taxation. **Woodruff v. Parham**, 8 Wallace, 123, 19 L. ed. 382; **Brown v. Houston**, 114 U. S. 622, 29 L. ed. 257, **American Steel & Wire Co. v. Speed**, 192 U. S. 500, 48 L. ed. 538; **Sonneborn Bros. v. Keeling**, 262 U. S. 506, 67 L. ed. 1095.

Upon the other hand, where goods are received into a state on orders previously received and delivered, in unbroken packages, such transactions are interstate commerce, and the subject of sale is not liable to a state excise tax. **Standard Oil Co. v. Graves**, 249 U. S. 389, 63 L. ed. 662; **Askren v. Continental Oil Co.**, 252 U. S. 444, 64 L. ed. 654; **Bowman v. Continental Oil Co.**, 256 U. S. 642, 65 L. ed. 1139.

In the instant case, however, the transactions involved commodities moving out of the state, and the rule is that from the moment the interstate movement begins, the commodity is not subject to local taxation.

As to the right of the state to tax property moving out of the state in interstate commerce, it was announced in the case of **Coe v. Errol**, 116 U. S. 517, 29, L. ed. 715, that the commod-

ity sought to be taxed must have started on its interstate journey. It must be borne in mind that that case did not involve an excise or occupation tax but there was what is known as an ad valorem assessment against the property itself, or, in other words, a property tax.

The same rule was applied as to a property tax. **Union Refrigeration Transit Co. v. Lynch,** 177 U. S. 149, 44 L. ed. 708; **American Refrigeration Transit Co. v. Hall,** 174 U. S. 70, 43 L. ed. 899. In those cases the court held that both the cars were instruments of interstate commerce since an average number of them were present in the state as property during each year they had a local status rendering them subject to a property tax.

Section 112 Mississippi state constitution contains the following language:

> "Section 112. Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value."

Excise or occupation taxes are not within the section. **Clarksdale Ins. Agency v. Cole,** 87 Miss. 637, 40 So. 228; **Daily v. Swope,** 47 Miss. 367. The sales of gasoline, however, such as are involved in this case, under Mississippi statutes, are intended as an excise or occupation tax. **Panhandle Oil Co. v. State,** 147 Miss. 663, 112 So. 584. In other words, the tax in question is a tax, not upon property owned by the appellant in the state of Mississippi. Appellant would be liable for and doubtless paid taxes on all property which it owned as of the taxable date in the state. The tax, however, involved in this case is upon the sale itself, that is to say, it is admitted that the gasoline was sold in the regular course of business for the purpose of being immediately transported out of the state, carried into and consumed in a regular channel of interstate commerce; still it is not the property situated in Mississippi which is taxed, but the sale itself, and, we submit to the court that there is a very obvious distinction between a property

tax against specific property itself situated in the state, and the right to make a sale. Even if it be conceded, for the sake of argument, that the appellant parted with all title and its responsibility was at an end when it delivered the gasoline to the packer's boat at the wharf at Biloxi, the purchase by the packer, the sale by the appellant, the preparation of the same for delivery, and the delivery thereof, was interstate commerce, not subject to excise tax.

Reverting to our pronouncement that the question of interstate commerce is not to be determined upon the question as to whether and when the legal title passes, in the case of **Hannibal R. R. Co. v. Husen,** 95 U. S. 465, 24 L. ed. 527, the court held that the owner of cattle driving the same through and across the state of Texas into another state, was engaged in interstate commerce and not subject to state regulation.

In the case of **Kelly v. Rhoades,** 188 U. S. 1, 47 L. ed. 359, the owner of a herd of 10,000 sheep drove them from Utah through the state of Wyoming, on the way to Nebraska for the purpose of selling the sheep. They traveled about nine miles per day, grazing somewhat in their onward travel. The statutes of Wyoming levied a tax upon cattle grazing. The state court held that the owner was liable therefor. On appeal to this court it was held that they were moving in interstate commerce and not subject to state taxation.

The case of **T. & N. R. R. Co. v. Sabine, Tram Co.,** 227 U. S. 111, 57 L. ed. 442, is in point. In that case lumber was shipped from an interior point in Texas, to Galveston, and was billed to the purchaser thereof, who immediately upon obtaining the bill of lading, unloaded the lumber from the cars and had the same loaded on a ship. Such movement was within the intention of the parties at the time of the shipment. This court held that the movement was interstate commerce, using the following language:

"The facts in the case at bar are different. The lumber was ordered, manufactured, and shipped for export.

> And we say 'shipped,' for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipment was a perfectly natural one, and did not change the relation of the Powell Company to it, and make the lumber other than lumber purchased at Ruliff, and started from there in transportation to a foreign destination. The findings are explicit and circumstantial as to this. And the shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906 39,554,000 feet. Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transhipment at Sabine. **Swift & Co. v. United States,** 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

In the case of **U. S. v. Benson,** 234 U. S. 548, 58 L. ed. 1459, the court held that interstate pipe lines belonging to oil companies and transporting oil owned by such companies was interstate commerce, and subject to congressional action. The court used the following language:

> "The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. **Rearick v. Pennsylvania,** 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 159. See **Texas & N. O. R. R. Co. v. Sabine Tram Co.,** 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229. The situation that we have described would make it illusory to deny the title of commerce to such transportation.

beginning in purchase and ending in sale, for the same reasons that make it transportation within the act."

In **Pennsylvania Ry. Co. v. Sonman,** 242 U. S. 120, 61 L. ed. 188, this court held that the delivery of coal on cars f.o.b. the mines destined to points outside the state was interstate commerce. In other words, although the title passed out of the seller to the buyer, on delivery to the carrier, since the property was intended to be conveyed from one state to another, the shipment was in interstate commerce, and not subject to state regulation.

In **Western Union Teleg. Co. v. Foster,** 247 U. S. 105, 62 L. ed. 1006, this court held that the transmission of market quotations by telegraph from New York to Boston was interstate commerce, not subject to state regulation in the receiving state; that the interstate commerce was to be determined by practice, intent, typical course and not title, using the following language:

> "Thus, lumber purchased in Texas for the purchase of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. **Texas & N. O. R. Co. v. Sabine Tram Co.,** 227 U. S. 111, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229. Practice, intent, and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in **Railroad Commission v. Texas & P. R. Co.,** 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837, and is too well settled to need to be further sustained. **Western Oil Ref. Co. v. Lipscomb,** 244 U. S. 346, 349, 61 L. ed. 1181, 1183, 37 Sup. Ct. Rep. 623. See **Swift & Co. v. U. S.,** 196 U. S. 375, 398, 399, 49 L. ed. 518, 525, 526, 25 Sup. Ct. Rep. 276."

Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 67 L. ed. 309. In that case the owner of logs put them in a river for the purpose of shipping the same in interstate commerce.

Owing to obstruction in navigation, the passage of the logs was stopped for some time. The court held that the logs started in interstate commerce and were not subject to taxation, using the following language:

> "The interstate commerce clause of the constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. **State, Dermold, Prosecutor v. Engle,** 34 N. J. L. 425, 435; **State, Lehigh & W. Coal Co. Prosecutor v. Carrigan,** 39 N. J. L. 36. This was the case in **Kelly v. Rhoades,** 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259, in which sheep driven 500 miles from Utah to Nebraska, which traveled 9 miles a day, were held immune from taxation in Wyoming, where they stopped and grazed on their way."

In the case of **Hughes Bros. v. Minnesota,** 272 U. S. 469, 71 L. ed. 359, the court held that logs when placed in a river for shipment, and the ice melted, and they began to move down the stream, had started in interstate commerce and were not subject to taxation. The court used the following language:

> "Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more diffi-

cult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the Champlain Co. case. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the Champlain Co. case."

This case is even stronger in that the tax is one upon the sale itself and not a property tax. Besides the gasoline started on its interstate journey as it was drawn from storage tanks and placed in sealed drums. While it may have been within the range of possibility that the purchaser might have diverted the shipment, the amount ordered corresponded as to quantity with the requirements of the fishermen in the Louisiana marshes. Upon the other hand, from the time the gasoline was drawn from the tank into sealed drum, there was one continuous movement. We must bear in mind again that the tax was upon the sale, and to state the case most strongly for the state of Mississippi, the sale was not completed until the sealed drums containing gasoline were placed on the wharf at the water's edge.

In **Ozark Pipe Line v. Monier**, 266 U. S. 555, 69 L. ed. 439, it was held that a pipe line transporting crude oil from one state to the other was not subject to an excise tax. The court used the following language:

"The tax is one upon the privilege or right to do business (**State ex rel. Marquette Hotel Invest. Co. v. State Tax Commission**, 282 Mo. 213, 234, 221 S. W. 721); and if appellant is engaged only in interstate commerce, it is con-

ceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form,—whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. **Leloup v. Mobile,** 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; **Kansas City, Ft. S. & M. R. Co. v. Botkin,** 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond power of state taxation. **Eureka Pipe Line Co. v. Hallanan,** 257 U. S. 265, 272, 66 L. ed. 227, 231, 42 Sup. Ct. Rep. 101; **United Fuel Gas Co. v. Hallanan,** 257 U. S. 277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105."

In the case of **Pennsylvania Gas Co. v. Public Service Com.,** 252 U. S. 23, 64 L. ed. 434, and in the case of **Pennsylvania v. West Virginia,** 262 U. S. 553, 67 L. ed. 1117, it is held that the transmission of gas from one state to another was interstate commerce and not subject to state regulation. The question of ownership was unimportant. The question of medium is equally as unimportant.

United States v. Hill, 248 U. S. 420, 63 L. ed. 337. In this case it is held that the transportation of intoxicating liquor upon the person of one being carried in interstate commerce is in itself interstate commerce. The court used the following language:

"The constitution confers upon congress the power to regulate commerce among the states. From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. **Gibbons v. Ogden,** 9 Wheat. 1, 188, 6 L. ed. 23, 68; **Gloucester Ferry Co. v. Pennsylvania,** 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826. 'Importation'

into one state from another is the indispensable element—the test—of interstate commerce. **International Textbook Co. v. Pigg,** 217 U. S. 91, 107, 54 L. ed. 678, 685, 27 L. R. A. (n. s.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; **The Lottery Case** (Champion v. Ames) 188 U. S. 321, 345, 47 L. ed. 492, 496, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. The transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of congress. **Pipe Line Cases** (United States v. Ohio Oil Co.) 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words, 'interstate commerce.' U. S. v. Chavez, 228 U. S. 525, 532, 57 L. ed. 950, 952, 33 Sup. Ct. Rep. 595."

The rule was reaffirmed in the case of **U. S. v. Simpson,** 252, U. S. 465, 64 L. ed. 665, 10 A. L. R. 510, and in the note in the last above mentioned case the following authorities are cited:

"It seems clear that the mere fact that articles are carried in private conveyances does not prevent the transaction becoming interstate commerce. For example, in **Kirmeyer v. Kansas,** (1915) 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419, the business carried on within the state of Kansas by a liquor dealer who maintained an office and warehouse in a small town on the Missouri side of the Missouri river, connected by a bridge with Leavenworth, Kansas, and who filled all orders for liquor for Kansas customers by delivery from such warehouses in his own horse-drawn wagon, either directly or by hauling the liquor to the Leavenworth railway depots for transportation to other Kansas points, all mail orders from Kansas customers being carried across the river before being opened, and all liquor received by him at the railway depots in Leavenworth, though destined for Kansas customers, being first hauled by him to his warehouse across the river,

was held to be interstate commerce. The fact that such dealer was a citizen of Kansas, who, having long carried on an illegal liquor trade in Leavenworth, moved his business across the river to evade the Kansas prohibitory laws, without changing his residence, or removing from Leavenworth the wagons and teams used by him in conducting the business, was held not to prevent this being interstate commerce.

"The fact that goods are transported in the owner's conveyance is not conclusive that it is not interstate commerce. Thus, the transportation of oil through various states by means of a pipe line has been held to be interstate commerce, although the oil belongd to the owner of the line, where this oil was purchased by the owner and was transported for the purpose of being sold. **Pipe Line Cases** (U. S. v. Ohio Oil Co.) (1914) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956. The pipe lines, although not technically common carriers, yet were carrying all oil offered, if only the officers would sell at the price fixed by the owner of the pipe lines. It is laid down as a general principle in this case that the fact that the oil transported belonged to the owner of the pipe line is not conclusive against the transportation being interstate commerce. The transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce. **Pennsylvania Gas Co. v. Public Service Commission** (1920) 252 U. S. 23, 64 L. ed._____P. U. R. 1920 E, 18, 40 Sup. Ct. Rep. 279. A railroad company engaged in hauling its own rails upon its construction train, both locally and across the state lines, is engaged in interstate commerce so as to bring it within the Federal Safety Appliance Act. **United States v. Chicago, M. & St. P. R. Co.** (1906) 149 Fed. 486."

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. ed. 227, is directly in point. In that case oil was assembled from

various producers by a pipe line company, and delivered to it for transmission. The larger portion of it flowed out of the state, but the pipe line company determined the destiny of the oil, and a portion of it was delivered in the state of Virginia. Upon the delivery of the oil to the pipe line company, the producer received credit on the books of the pipe line company therefor. This court used the following language:

> "As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax, to be valid, 'must not, in its practical effect and operation, burden interstate commerce.' It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have change the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company, not the producer, was the master of the desination of any specific oil. Therefore, its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

In **Brooks v. U. S.**, 267 U. S. 432, 69 L. ed. 699, it was held that the interstate transportation by a motor vehicle by a person who knew the same to have been stolen, was interstate commerce, and a violation of the National Motor Vehicle Theft Act. The court used the following language:

> "In **Hoke v. U. S.**, 227 U. S. 308, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905, and **Caminetti v. United States**, 242 U. S. 470, 61 L. ed. 442, L. R. A. 1917 F, 502, 37 Sup. Ct. Rep. 192, Ann. Cas, 1917B, 1168, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one state to another for immoral purposes or otherwise, was valid because it was intended to prevent

the use of interstate commerce to facilitate prostitution or concubinage and other forms of immorality."

The case of **Peoples Natural Gas Co. v. Public Service Commission,** 270 U. S. 550, 70 L. ed. 726, is directly in point. This court held that the transportation of gas through the state of Virginia by a pipe line, and the delivery to the purchaser at the state line through a meter, was interstate commerce, and not subject to state regulation, using the following language:

> "As respects the West Virginia gas we are of the opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point, and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business. **Western U. Tel. Co. v. Foster,** 247 U. S. 105, 112, 113, 62 L. ed. 1006, 1015, 1016. 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; **Public Utilities Commission v. Landon,** 249 U. S. 236, 245, 63 L. ed. 577, 586, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268; **Penn. Gas Co. v. Public Service Com.,** 252 U. S. 23, 64 L. ed. 434, 441, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279; **United Fuel Gas Co. v. Hallanan,** 257 U. S. 277, 280, 66 L. ed. 234, 238, 239, 42 Sup. Ct. Rep. 105; **Pa. v. W. Va.** 262, U. S. 553, 67 L. ed. 1117, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658; **Binderup v. Pathe Exch.** 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96; **Missouri ex rel Barrett v. Kansas Natural Gas Co.,** 265 U. S. 298, 68 L. ed. 1027, 44 Sup. Ct. Rep. 544, **Ohio R. R. Com. v. Worthington,** 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653, **Lemke v. Farmers Grain Co.,** 258 U. S. 50, 66 L. ed. 458, 42 Sup. Ct. Rep. 244, **Shafer v. Farmers Grain Co.,** 268 U. S. 189, 69 L. ed. 909, 45 Sup. Ct. Rep. 481."

The essential facts are that here was a continuous flow of gasoline from the state of Mississippi into the state of Louisiana to be used in the latter state. The question is not presented of an occasional or an isolated sale. Upon the other hand we have a well-established course of business carried on in a practical manner. Suppose that the seller in its own conveyances had contracted to sell and deliver the gasoline at Grant's Pass. That such course of business would have constituted interstate commerce cannot be questioned. Suppose that there had been a regular carrier either by land or water transporting property to Grant's Pass and the contract of sale had required the seller to deliver the commodity to such carrier. Title would have passed to the buyer upon delivery to the carrier.

United States v. Andrews & Co., 207 U. S. 229, 28 Sup. Ct. Rep. 100 **Hatch v. Standard Oil Co.**, 100 U. S. 124. **Halliday v. Hamilton,** 11 Wall. 560; **The Mary & Susan,** 1 Wheat. 25; **The Frances,** 9 Cranch. 183. Yet the transactions would have been in interstate commerce although the title may have passed in the state of Mississippi. Interstate commerce does not depend upon the question of the passage of title or the medium of conveyance. The essential characteristics of interstate commerce are the negotiations, the contract of purchase and the transportation in interstate commerce. That the gasoline was required to be carried from the state of Mississippi into the state of Louisiana in order to meet the requirements of fishermen is unquestioned. The movement was not the sole ingredient of interstate commerce. The negotiations, purchase and delivery at the water's edge were essential and integral parts of the interstate commerce. In other words, there could have been no transportation without the negotiations, the contract of purchase and the delivery at the water's edge.

In the case of **Helson v. Commonwealth of Kentucky,** supra, the Kentucky statute imposed a tax upon the use of gasoline, and the plaintiff operated a ferry between Illinois and Kentucky,, three-fourths of the trip taking place in Ken-

tucky. The state court decided, however, that the use of gasoline in the state in the operation of the boat was not interstate commerce, using the following language:

> "And it is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of congress to regulate that portion of commerce between the states.' **Glocucester Ferry Co. v. Pennsylvania,** supra, page 214."

So in this case there could have been no transportation from the state of Mississippi into the state of Louisiana except as a result of negotiations, contracts of purchase, preparation for delivery and delivery. These things were just as much part of the interstate commerce as the transportation itself and cannot be separated therefrom. The fishermen of the state of Louisiana who desired gasoline were unable to produce the same, nor were the packers able to do so. They were dependent for their source of supply on obtaining the required gasoline by purchase. The amount purchased was the exact amount required to be taken to the state of Louisiana, and the purchase was just as an essential portion of the interstate commerce as the transportation. It is just this conception which the decision of Judge Anderson of the supreme court of the state of Mississippi overlooks. The usual effort was made to divide the transaction into sealed compartments and separate as totally disconnected from the transportation that part which took place in the state of Mississippi. This cannot be done.

Interstate commerce is, as we shall show the court, a practical proposition, depending upon not the technical niceties of title, but the usual course of business. What was done in order to meet the requirements of the fishermen cannot be separated on the instalment plan and allocate entirely to Mississippi a given portion thereof as being disconnected from the interstate movement. The requirements of interstate commerce, the negotiations, the purchase and the means of transportation are constantly changing in order to meet the commercial requirements of a rapidly developing industrial structure. A man picks up a telephone receiver in one state and communicates with a citizen in another state on a matter of business. Or such person sends a telegram from one state to another; or an individual stands at a radio broadcasting station, advertises his wares into other states, negotiates and invites contracts for purchase or sale or sells the products of his brain either in song or story to the public in other states. All of these things are interstate commerce and are not subject to state taxation.

In the case of **Rossi v. Pennsylvania,** 238 U. S. 62, 59 L. ed. 1201 it was held that a privilege tax may not be imposed upon the solicitation of sales of intoxicating liquors in one state to be shipped in fulfillment of orders taken in another state. This rule is based upon the philosophy that the commerce clause of the constitution of the United States protects from state control not only the transportation of property but the solicitation of orders.

The case of **Dahnke-Walker Mill. Co. v. Bondurant,** 257 U. S. 282, 66 L. ed. 239 is directly in point. There a resident of Tennessee went into Kentucky and made a contract for the purchase and shipment of grain from the state of Kentucky into the state of Tennessee. The seller was to deliver the grain on board cars for the buyer. Payment was to be had in the state of Kentucky. Title would pass to the buyer upon delivery in the state of Kentucky. The buyer intended to ship the wheat out of the state of Kentucky, and such action constituted the usual course of business. This court held the transaction

was in interstate commerce and not subject to state regulation, using the following language:

> "Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. **Brown v. Maryland,** 12 Wheat. 419, 446, 447, 6 L. ed. 678, 688, 689; **American Steel & Wire Co. v. Speed,** 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. **American Exp. Co. v. Iowa,** 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus it was said in **Welton v. Missouri** 91 U. S. 275, 280, 23 L. ed. 347, 349; ' "Commerce" is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In **Kidd v. Pearson,** 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: 'Buying and selling and the transportation incidental thereto constitutes commerce.' In **U. S. v. E. C. Knight Co.,** 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in **Addyston Pipe & Steel Co. v. U. S.,** 175 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 96, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and

includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities.' In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."

In **Davis v. Farmers Coop. Assn.**, 262 U. S. 312, 67 L. ed. 996, it was held that solicitation of traffic by agents of a railroad company of a state remote from their lines is part of the business of interstate commerce and not subject to state regulation.

In **Spalding v. Edwards**, 262 U. S. 261, 67 L. ed. 865, a broker received orders from a foreign country for certain goods. On its own account it ordered the goods from plaintiff in error, and directed plaintiff in error to deliver the goods to an exporting navigation company. This the plaintiff in error did, taking receipts therefor in the name of the broker. The broker in turn exchanged the receipts for export bills of lading. The title passed at the moment that the goods were delivered to the carrier, although subsequent to the time the broker exchanged the receipts for bills of lading. This court held that the transaction was interstate commerce and not subject to the tax sought to be imposed thereupon, using the following language:

"The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. The fact that further acts were to be done before the goods would set to sea does not matter, so long as

they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Co., and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Co., was solely for the purpose of Delgado & Co., and for their account and risk. Theoretical possibilities may be left out of account. In **R. R. Com. v. Texas & P. R. Com.**, 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837, the consignees might have retained the goods at New Orleans instead of shipping them abroad. The fact that they came to New Orleans by rail from another place in the state made no difference. The same principle was applied in **Texas & N. O. R. Co. v. Sabine Tram Co.**, 227 U. S. 111, 123, 57 L. ed. 442, 447, 33 Sup. Ct. Rep. 229. The overt act of delivering the goods to the carrier marks the point of distinction between this case and **Cornell v. Coyne**, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383. To put it at any later point would fail to give to exports the liberal protection that hitherto they have received; of which an example may be seeen in **Thames & M. Marine Ins. Co. v. U. S.**, 237 U. S. 19, 50 L. ed. 821, 35 Sup. Ct. Rep. 496. Ann. Cas. 1915 D 1087."

Flanagan v. Federal Coal Co., 267 U. S. 222, 69 L. ed. 583 was directly in point. In that case the plaintiff contracted to sell and the defendant to buy certain coal to be delivered f. o. b. cars Tracey City, Tennessee. Seller to deliver the coal in the state of Tennessee, taking bills of lading in the name of Federal Coal Co., and consign the coal to the buyers customers in other states. This court held that the transaction was in interstate commerce, using the following language:

"There was some discussion below to show that Flanagan also bought this coal as a dealer, and so was subject to the law in respect of this transaction. But for the pres-

ent purpose it is immaterial how he came by what he sold. For if he was engaged in interstate commerce, he could not be impeded because he was a dealer, any more than if he was selling from his own mine. It was understood between the parties that these dealings were steps in sending coal from the mines to purchasers in other states. Very likely the Federal Coal Co., might have stopped the coal at Tracey City, in Tennessee, but it had no thought of doing so, and Flanagan understood the course of business in which he was expected to cooperate and did cooperate. Therefore in this matter the parties were engaged in interstate commerce, and the state law even if valid as a tax could not invalidate their contract. **Dahnke-Walker Mill. Co. v. Bondurant**, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Lemke v. Farmers Grain Co.**, 258 U. S. 50, 66 L. ed. 458, 42 Sup. Ct. Rep. 244; **A. G. Spalding & Bros. v. Edwards**, 262 U. S. 66, 69, 70, 67 L. ed. 865, 867, 868, 43 Sup. Ct. Rep. 485. We see no sufficient reason for believing that the decision would have been the same if the state court had regarded the transactions as interstate commerce, and therefore its decision must be reversed."

Federal Trade Com. v. Pac. States Assn., 273 U. S. 52, 71 L. ed. 534 is directly in point. That was a suit by the Federal Trade Commission to prevent carrying out of certain trade agreements in violation of the Federal anti-trust laws. In order to bring about uniformity of price in various states, the manufacturer or wholesaler would sell the commodity,—in that case paper,—to a local dealer in its own state, and the local dealer would, in turn, ship the same to a customer or manufacturer outside of the state. This court held that the transaction was in interstate commerce, using the following language:

"The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and

to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical, legal conception but a practical one, drawn from the course of business.' **Swift & Co. v. U. S.**, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. **Dozier v. Alabama**, 218 U. S. 124, 128, 54 L. ed. 935, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. **Dahnke-Walker Mill. Co. v. Bondurant**, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; **Lemke v. Farmers Grain Co.**, 258. U. S. 50, 55, 66, L. ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business, completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. **Sonneborn Bros. v. Cureton** (Sonneborn Bros. v. Keeling) 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. **Dozier v. Alabama**, supra; **Western U. Tel. Co. v. Foster**, 247 U. S. 105, 113, 62 L. ed. 1006, 1015; 1 A. L. R. 1278, P. U. R. 1918 D, 865, 38 Sup. Ct. Rep. 438; **Lemke v. Farmers Grain Co.**, supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction

one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

In **Di Santo v. Pennsylvania,** 273 U. S. 34, 71 L. ed. 524, the State of Pennsylvania placed a privilege tax upon the occupation of soliciting interstate passengers and the sale of steamship tickets to other states and foreign countries. This court held that the tax was upon interstate commerce and void.

In **Public Utilities Commission v. Attleboro,** 273 U. S. 83, 71 L. ed. 549, the court held that the transmission of electricity from one state to another is interstate commerce, although the custody and title are transferred from vendor to purchaser at the state boundary.

The case of **Panhandle Oil Co. v. State of Mississippi,** 277 U. S. 218, 72 L. ed. 857, is necessarily fatal to the contention of the state of Mississippi in this case. In that case the supreme court of Mississippi was called upon to construe the identical statutes herein involved, which were sales to the United States government. This court held that the tax was on the sale itself, and, therefore, exacted tribute from the United States government. The court used the following language:

"The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the National government under the constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

"The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales of the government. **Wagner v. Covington,** 251 U. S. 95, 102, 64 L. ed. 157, 167, 40 Sup. Ct. Rep. 93. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the

seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. **M'Culloch v. Maryland,** supra, 436, (4 L. ed. 608); **Gillespie v. Oklahoma,** supra, 505; (66 L. ed. 340, 42 Sup. Ct. Rep. 171); **Jaybird Min. Co. v. Weir,** 271 U. S. 609, 613, 70 L. ed. 1112, 1114, 46 Sup. Ct. Rep. 592. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. **Western U. Teleg. Co. v. Texas,** 105 U. S. 460, 26 L. ed. 1067; **Frick v. Pennsylvania,** 268 U. S. 473, 494, 69 L. ed. 1058, 1064, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603. And it is to tax the United States—to exact tribute on its transactions and apply the same to the support of the state."

In **Crutcher v. Kentucky,** 141 U. S. 47, 35 L. ed. 649, this court used the following language:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right unless congress should see fit to interpose some contrary regulation on the subject."

That is to say, the same rule as was announced in the **Panhandle Oil Co.,** case is true here. The right to engage in in-

terstate commerce does not come from the state law, and it can lay no tribute thereupon either directly or indirectly. The tax in this case is not an inspection tax provided in pursuance of the state's duty to protect its citizens, but is one for raising of revenue to construct public highways. In this connection the case of **Foster Fountain Packing Co. v. Haydel,**_____U. S._____, 73 L. ed. 1 is interesting as illustrating the immateriality of the means employed in transportation. In that case persons in Louisiana contracted to transport and deliver shrimp from the state of Louisiana in the state of Mississippi. As a matter of fact, the record disclosed that the fishermen in the transporting engaged the boats of the buyers and used them for such purpose.

In the case of **Heyman v. Hays,** 236 U. S. 178, 59 L. ed. 527, it was held that substance and not form determines whether a given transaction is interstate commerce.

In **R. R. Co. v. Covington,** 235 U. S. 537, 59 L. ed. 350, it is held that interstate commerce must be determined by what is done and not by the nature of the carrier.

In **Gloucester Ferry Co. v. Pennsylvania,** 114 U. S. 196, 29 L. ed. 158, it held that the means employed to transport property is immaterial.

Judge Anderson, speaking for the supreme court of the state of Mississippi in this case, laid emphasis upon the fact that the transportation receipt issued by the master of the packer's boat in this case was a pure subterfuge and determined that the transactions were intrastate. We wish briefly to direct the attention of the court to this phase of the case.

1. Judge Anderson states that Mr. Royster (R. 31) testified that this method of transportation was a mere subterfuge in order to confer upon the shipments interstate characteristics. We respectfully submit that the testimony of Mr. Royster is not susceptible to any such construction, and it is for this court to determine the facts under the assignment of error herein involved.

2. It was perfectly competent for the purchaser and the seller to make any agreement they saw fit respecting the passage of the title. In **Harkness v. Russell**, 118 U. S. 663, 30 L. ed. 285, THIS COURT USED the following language:

> "The rule is formulated in the textbooks and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published 40 years ago, two rules are laid down as established: 1. That where, by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. 2. That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackburn, Sales, 152. And it is subsequently added that 'the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled.' Blackburn, Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal Property adds, to the two formulated rules of Lord Blackburn, a third rule, which is supported by many authorities, towit: 3. 'Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' Benj. Sales, 2nd ed. p. 236; 3rd ed. sec. 320. The author cites for this proposition **Bishop v. Shillito**, 2 B. & Ald. 329, note A; **Brandt v. Boldy** 2 Barn & Ad. 932; **Barrow v. Coles**, (Lord Ellenborough, 3 Camp. 92; **Swain v. Shepherd**, (Barron Parke), 1 Mood. & Rob. 223; **Mires v. Solebay** 2 Mod. 243."

The same rule was announced in **U. S. v. Woodruff**, 89 U. S. 180, 22 L. ed. 863. The rule was examined and reaffirmed **Segrist v. Crabtree**, 131 U. S. 287, 33 L. ed. 125; and the rule

was examined and reapplied in **Beardsley v. Beardsley,** 138 U. S. 262, 35 L. ed. 928.

In **Williston on Sales,** 2nd ed. Vol. 1, par. 259, the following rule is announced:

> "259. Property is transferred when the parties so intend—Provisions of the Sales Act.
>
> "Sec. 18. Property in specific goods passes when parties so intend—(1). Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2). For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

The right of persons to make necessary contract with reference to their business and in respect to the acquirement and enjoyment of life, liberty or property is protected by the constitution of the United States. **Algeyer v. Louisiana,** 165 U. S. 578, 41 L. ed. 832.

3. There is still, however, a further answer to the criticism and it is this: that interstate commerce must be determined by the nature of the transactions, and if the transactions possess the characteristics and essentials of interstate commerce, they are such, irrespective of what parties may term them. At the same time the form of billing and/or the terms applied by the parties to the transaction may be looked into in order to determine the real nature of the transaction. Suppose that these shipments, instead of going to Louisiana, as a matter of fact, had gone to some point in Mississippi; then the remarks of Judge Anderson would have been applicable and the arraignment would have been a fraud, in fact and in law. But it is undisputed, and the opinion so shows, the shipments were intended to go and actually went in interstate

commerce. Therefore, they were inherently interstate commerce, possessed all the essentials and characteristics of interstate dealings, and it was perfectly proper for the parties thereto to use any form of contract or billing tending to identify and preserve the interstate characteristic of the transactions.

In **Savage v. Jones**, 225 U. S. 501, 56 L. ed. 1182, Mr. Justice Hughes used the following language:

> "In answer, it must again be said that 'commerce among the states is not a technical, legal conception, but a practical one, drawn from the course of business.' **Swift & Co. v. U. S.**, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; **Rearick v. Pennsylvania**, 203 U. S. 507, 512, 51 L. ed. 295, 297, 27 Sup. Ct. Rep. 150. It apearly appears from the bill that the complainant was engaged in dealing with purchasers in another state. His product manufactured in Minnesota was, in pursuance of his contract of sale, to be delivered to carriers for transportation to the purchasers in Indiana. This was interstate commerce, in the freedom of which from any unconstitutional burden the complainant had a direct interest."

Substance and not form must determine the nature of the transaction. Regard must be had for what was dones. **Heyman v. Hays**, 236 U. S. 178, 59 L. ed. 527; **R. R. v. Covington**, 235 U. S. 537, 59 L. ed. 350.

Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 61 L. ed. 1181 is directly in point. In that case the plaintiff had an oil refinery in Illinois and a steel barrel factory in Indiana, and was selling the products of its refinery and factory upon orders taken from traveling salesmen. In order to fill orders taken in Tennessee it shipped into that state a tank car of oil and a car of steel barrels. Both the oil and the barrels were billed to the plaintiff in Tennessee, and orders were filled by taking the oil from the car and put the same into steel barrels for delivery to customers in pursuance to orders previously

taken. This court held that the transactions were interstate commerce and not subject to state taxation, using the following language:

"In the second part of the decision we think the court erred. Unlike **Gulf C. & S. F. R. Co. v. Texas,** 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360, this is not a case where, at the time of the original billing, the shipper had no purpose to continue the transportation beyond the destination then indicated; nor is it a suit, as was that, to penalize a carrier, which rightly conformed its action to what was said in the bill of lading. On the contrary it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a re-billing or reshipment en route does not of itself break the continuity of the movement or require that any part be classified directly from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive. **Southern P. Terminal Co. v. Interstate Com. Com.,** 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; **R. R. Com. v. Worthington,** 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; **Texas & N. O. R. Co. v. Sabine Tram Co.,** 227 U. S. 1111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; **R. R. Com. v. Texas & P. R. Co.,** 229 U. S. 336, 57 L. ed. 1215; 33 Sup. Ct. Rep. 837; **Chicago M. & St. P. R. Co. v. Iowa,** 233 U. S. 334, 343, 58 L. ed. 988, 992, 34 Sup. Ct. Rep. 592; **South Covington & C Street R. Co. v. Covington,** 235 U. S. 537, 545, 59 L. ed. 350, 353, L. R. A. 1915, F 792, P. U. R. 1915A, 231, 35 Sup. Ct. Rep. 158."

It must be borne in mind in this case that the purchasers were acquiring oil from the appellant for which orders had been previously taken and the quantity of gasoline purchased from the appellant by the packers corresponded in every particular with the orders previously taken of the packers from the fishermen. This court laid emphasis upon such fact in the last above cited case.

In **Atlantic Coast Line v. Standard Oil Co.**, 275 U. S. 257, 72 L. ed. 270, this court used the following language:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such a character."

The supreme court of the state of Mississippi in its majority opinion arrived at the conclusion that the form of shipping receipt issued by the captain of the boat was a subterfuge, and being such of itself destroyed the interstate character of the transactions, completely leaving out of sight that which is perfectly obvious, towit, that whether the transactions were in interstate must be determined from their inherent, essential characteristics, and if the movements were in interstate commerce they could be made none the less so by a form of transportation receipt which the court thought was a subterfuge. Such an argument is to place more emphasis upon the shadow than upon the form. The transactions were none the less interstate commerce, even if the contracts of shipment in respect to the retention of title were mere shadows. As a matter of fact, however, we submit that it was within the province of the parties to agree as to when the title should pass. We do not believe that such an arrangement could have the effect of changing purely intrastate transactions into those of an interstate nature, but in connection with purely interstate movements and dealings the parties had a perfect right to enter into such contracts to give the movements such billing

and to throw around the transactions any badges or apparel which would identify and preserve the interstate characteristics of the shipment. The contract was important in showing that the parties intended the transactions to be in interstate commerce. Their intention could not transfer purely intrastate shipments into interstate ones. At the same time, their intention was important, and when taken in connection with the fact that such transactions constituted the usual course of business, created and were a regular channel in interstate commerce furnishing from the source of supply to the point of consumption in another state, an important commodity; that the transactions extended over a period of two years, were not isolated and unusual; that the shipments comprised a large number of shipments, towit, approximately 1,000 aggregating in excess of 500,000 barrels, for which taxes are sought in an amount approximating $25,000.00: we respectfully submit that the sales were in interstate commerce, and the state of Mississippi was without authority to lay tribute thereupon. The right to make these sales was not derived from the laws of the state of Mississippi, but came from the fundamental law of the land.

The case of **Browning v. Waycross,** 233 U. S. 16, 58 L. ed. 829 relied upon by the supreme court of the state of Mississippi, is distinguished most excellently in the dissenting opinion of Judge Ethridge (R. 68). At page 75 he uses the following language:

"In that case the goods had been shipped and delivered to the purchaser, but the contract called for in addition to the delivery of the goods at destination, that the seller would place the rods upon the building which they were purchased to serve. And the question is not whether the transportation from the buyer to the seller was interstate commerce, but whether the business of directing the rods or attaching them to the building was a local business. The court held that it was not an interstate commerce transaction to engage in the business of putting the rods

upon the building. Of course, the erecting of buildings, and the placing of fixtures on them, is not a part of interstate commerce, as it is entirely severable and separate therefrom, and becomes a business or occupation."

It might be helpful to the court for us to go a step further and call attention to the fact that the value of the last above mentioned case as an authority was greatly impaired in the more recent case of **York Manufacturing Co. v. Colley**, 247 U. S. 21, 62 L. ed. 963. In that case the court held that the provision in the contract of sale of an artificial ice plant by which the foreign corporate seller agreed to furnish an engineer to assemble and erect the machinery at the point of destination and make a practical efficiency test before completing said building, was an integral part of the interstate sale and not subject to taxation. In that case, commenting on the Waycross case, this court said:

"But the broad distinction which is established by the statement just made between what was decided in the Waycross case and the question here presented does not rest alone upon the implication resulting from what was under consideration in that case. But, moreover, expressly results from the fact that in the Waycross case, through abundance of precaution, attention was directed to the fact that the ruling there made was not controlling as to a case where the service to be done in a state as the result of an interstate commerce sale was essentially connected with the subject-matter of the sale; that is, might be made to appropriately inhere in the duty of performance. 233 U. S. 23.

"As, in the second place, since the ruling in **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. ed. 579, there has been no doubt that the interstate commerce power embraced that which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract

includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract made. The only possible question open, therefore, is, Was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer."

The negotiations looking to the sale of gasoline, the drawing of the gasoline from the storage tanks, the sealing of the same in drums, the transportation of the same to the water's edge and placing the same on boats to be transported to the state of Louisiana, regardless of where the title may have rested during the remainder of the transportation, were essentially connected with and a substantial part of the interstate transaction. In fact, it formed such an important part as that the actual movement could not have taken place without such negotiations, sale and subsequent acts on the part of the seller and the tax was laid upon the sale itself, which made the movement possible, and was that without which the movement could not have taken place.

We respectfully submit that the Mississippi statutes complained of, as construed, violate the commerce clause of the constitution of the United States; that the judgment of the supreme court of the state of Mississippi appealed from was erroneous, and should be reversed.

Respectfully submitted,

Wm. H. WATKINS,
W. LEE GUICE,
JOHN L. HEISS,
Counsel for Appellant

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CHARLES EL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

SUPERIOR OIL COMPANY, Appellant.

Vs.

MISSISSIPPI, EX REL,

GEORGE T. MITCHELL, Attorney General,

Appellee.

NO. 28

REPLY BRIEF FOR APPELLANT.

W. H. WATKINS,
JOHN L. HEISS,
W. LEE GUICE,
Counsel for Appellant.

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In The Supreme Court of The United States

OCTOBER TERM, 1929

SUPERIOR OIL COMPANY, Appellant.

Vs.

MISSISSIPPI, EX REL,

GEORGE T. MITCHELL, Attorney General,

Appellee.

NO. 28

REPLY BRIEF FOR APPELLANT.

We shall make no reply to the statement of facts set out by the appellee in-as-much as this statement seems to be merely a re-statement of the statement of fact of the opinion of the Supreme Court of Mississippi as it is set out in 119 Sou. Rep. page 360, except that we want to call to the court's attention that the appellee has added to its statement by the inclusion of certain parts of the evidence which it attempts to set out verbatim, the purpose of which we cannot under-

stand unless it is an effort to call to the court's attention that part of the evidence which the appellee thinks most favorable to its contention; however, while this testimony is incomplete in itself, it itself shows facts which would justify the finding of all of the courts which have considered this matter that unquestionably the gasoline, the basis of this case, was moved in interstate commerce, as for instance the following finding set out in the official opinion of the Supreme Court of Mississippi in which it decided the case against the appellant: "The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grants Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchaser for that identical interstate commerce."

ARGUMENT.

In the beginning we wish to call to the court's attention that the appellee admits:

FIRST.

The jurisdiction of this court.

SECOND.

That this court will examine the record and determine for itself whether or not the Mississippi statute complained of, as construed and enforced by the Supreme Court of Mississippi, burdens interstate commerce.

THIRD.

That a state cannot under the commerce clause of the Constitution of the United States tax interstate commerce.

The appellee, however, denies that the sale and delivery of gasoline by appellant in this case according to the established course of dealing was in a regular channel of inter-- state commerce and formed an integral part thereof.

We must here call to the court's attention that the Supreme Court of Mississippi in the paragraph quoted above, admitted that the sale of gasoline in the case at bar was for the purpose of interstate commerce, and it admitted that the gasoline immediately moved in interstate commerce, and the appellee, while it challenges the theory upon which the Supreme Court of the State of Mississippi decided this case, does not challenge these facts or this finding of fact by the Supreme Court.

It challenges the theory adopted by the Supreme Court that the case involved the question of whether or not the the bill of lading used herein was a valid bill of lading or merely a useless or unnecessary receipt as was decided by the Supreme Court of the State of Mississippi but it does not deny that from the minute the gasoline was purchased that at once a series of physical acts were performed by all the parties interested in the gasoline which resulted in the transportation of the gasoline through the streets of the City of Biloxi onto the decks of the schooner and from thence over a great public waterway to a destination in a sister state, and it does not challenge the fact that the purpose of the sale was that such transportation might take place.

The appellee seems to have adopted the following theory: That in-as-much as goods brought into a state cease

to have the interstate character protected by the commerce clause after they have come to rest in a state, that the converse of this would be true and the goods would not take on an interstate character until after purchase and delivery had taken place, and therefore after the title passed to the packers at Biloxi, Mississippi, in trust for the man in Louisiana that the Superior Oil Company, the appellant, passed as one of the parties to the interstate commerce transaction.

Before taking up the argument as to this contention, we want to present to the court the thought that none of the cases cited by the appellee in its points numbered from one to six even slightly resemble the facts in the case at bar or should be governed by the same rule of law. Taking up the cases in the order that they are cited we bring them to the attention of the court as follows:

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643; was a case where the State of Texas was attempting to recover a license or charge levied against the sale of gasoline in the State of Texas. This gasoline had been shipped from a sister state into Texas. It had come to rest in the warehouse of Sonneborn Brothers in Texas. It was then by Sonneborn Brothers sold in intra-state commerce in Texas and in all the facts of the case there was no suggestion of the invalidity of the tax because the article had been exported from Texas, but on the contrary, the law's validity was attacked because the article had been imported into Texas and all the court decided was that this protection of the com-

merce clause ceased when the goods came to rest in the state of their destination. It involved no question of outgoing commerce.

Bowman v. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606: This case is almost identical with the Sonneborn case. The gasoline was brought into one state from another state. This court held that as to the gasoline sold within the state after the same became a part of the general property of the Oil Company in the state that it was taxable, but as to that part which shows commerce coming within the state from without the state with all the usual elements of interstate commerce was not taxable; however, the court did not have before it any question of commerce from within to without the state.

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355: This case is a companion case of *Bowman v. Continental Oil Company*. The facts are the same and no question was here raised that was analagous to the question at issue in this case.

Banker Brothers v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38: This was the case where automobiles were purchased in New York and brought to Pennsylvania and placed in the place of business of Banker Brothers. Later they were sold to various persons, also residents of Pennsylvania, and Banker Brothers attempted to escape a Pennsylvania tax for the sole reason that at one time the automobiles were shipped from Buffalo, New York, to Pittsburgh, Pennsylvania. However, the court held

that the transaction was purely an intra-state transaction in that the automobiles had lost all claim to protection of the interstate commerce clause upon their delivery to Banker Brothers in Pittsburgh, and thereafter were subject to the same tax that any other property in the state was subject to. That the mere fact of their manufacture outside of the state did not protect them under the commerce clause. In this case there was absolutely no element of interstate commerce and no suggestion of a question of commerce from within Pennsylvania to a point without that state.

Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403: This case was a case where a butcher attempted to escape liability for a privilege tax because his meat was shipped from Chicago, but after reaching Atlanta a large part was sold to the trade generally in and about Atlanta. No part of it was shown to have afterwards been shipped out of the state in interstate commerce and there was no question involved of outgoing interstate commerce, the sole question being the claim of a freedom from the tax because of the origin of the goods. However, the court decided that the goods having reached their destination and a situs being obtained in Georgia that the dealing in same was taxable.

Pierce Oil Corporation v. Hopkis, 264 U. S. 137, 68 L. Ed. 593, 44 Sup. Ct. Rep. 251: The only question involved in the above case was one with reference to the Fourteenth Amendment. No question of interstate commerce was involved and we are making no claim that the State of Mississippi does not have a right to, without discrimination, levy a tax on sales in intra-state commerce.

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186: This case was one with reference to the collection of a severance tax on animals owned by the State of Louisiana in their wild state, while the skins of these animals were in the possession of one LaCoste. The tax was on the severance and not on the sale. There was nothing in the record to show that LaCoste had started them into any channel of commerce or that he was possessed of orders that would have laid the goods taxed into the channels of interstate commerce. The sole question of interstate commerce involved in the case was a claim that he intended to dispose of them in interstate commerce. This, Your Honors, disallowed, holding that an intention to send goods into the channels of interstate commerce is not sufficient to deprive the state of its right to tax the article and that therefore they are not protected by the commerce clause. There was not any sale or delivery to a private or public carrier shown in the record.

State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164: This case was one involving the right of a state to tax the gross receipts of Railway Companies, regardless of the nature of the commerce from which these receipts originated. It has no application to the case at bar, and the opinion rendered by the court has been explained away in many decisions of the court so that at this time it is without authority as to whether or not commerce of the kind shown in the record in this case can be taxed. The case was distinguished and its value as a precedent lessened in the following cases:

Fargo v. Michigan, 121 U. S. 242, 30 L. Ed. 893, 7 Sup. Ct. Rep. 861, holding state tax upon gross receipts of interstate railroads void; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 475, 33 L. Ed. 410, 10 Sup. Ct. Rep. 1362, tax imposed upon gross receipts from messages carried partly within and partly without State is void; *Indiana v. American Express Co.*, 7 Biss. 230, Fed. Cas. 7021, State can not impose tax upon receipts of foreign corporation for transportation of merchandise received and delivered out of State; *State v. Pullman Palace Car Co.*, 11 Biss. 566, 16 Fed. 200, State tax on gross receipts of foreign sleeping-car company, invalid; *Frere v. Von Schoeler*, 47 La. Ann. 327, 27 L. R. A. 415, 16 Sou. 810, license explicitly laying charge upon towboats for privilege of navigating river between Gulf of Mexico and New Orleans void; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 338, 340, 342, 345, 30 L. Ed. 1202, 1203, 1204, 7 Sup. Ct. Rep. 1121, 1122, 1124, holding State tax upon gross receipts of steamship company engaged in interstate and foreign commerce, void.

Woodruff v. Parham, 8. Wall. (U. S.) 123, 19 L. Ed. 382: This is one of the earlier cases holding that the mere fact that goods were imported into a state from another state does not make them tax free after they have been delivered to the consumee. An auctioneer in Mobile had received varied merchandise from points without the state for the purpose of selling it at public auction in Mobile. The sole question decided was that the commerce clause did not protect him to the extent that he was free from the duty to pay a license merely because the goods he was selling in

Alabama to people in Alabama had originated from without the state. There was no question of facts presented similar to or resembling in the slightest the question presented in this record.

We therefore call to the court's attention the above cases for the purpose of demonstrating that none of the authorities cited by the appellee in anywise bear on the question at issue in this case and having, as we believe, explained these cases, we now submit to the court the following answer to the argument advanced in the brief of appellee:

ANSWER TO ARGUMENT OF ALL POINTS ADVANCED BY APPELLEE.

The appellee, as far as we can gain from its brief, attempts to present to this court the fact that although the gasoline in the case at bar moved in interstate commerce, and although when it was sold it was the intention of the parties that it should commence this journey, that the State of Mississippi still retains its power to tax this commerce for the following three reasons:

1.

Because the gasoline was sold and afterwards paid for in the State of Mississippi.

2.

Because the bill of lading issued by the schooner was issued by the master of a boat owned by the one who paid for the gasoline.

3.

Because the gasoline was shipped out of the State of Mississippi on a boat which was not in all respects a common carrier, using the word common carrier in the strictest definition given it, that is, railroad or steamship lines devoted exclusively to the transportation of freight and passengers.

In the beginning of our argument we shall again call to the court's attention that none of the cases cited by appellee in anywise bear out its contention with reference to any of the above three points for the reason that no question analagous to the above questions presented itself in any of the cases. Each case cited, except *LaCoste v. Conservation Department of Louisiana,* embraced a transaction where property came from without the state to a point within the state, obtained a situs there and was afterwards sold in intra-state commerce, and in the LaCoste case the point involved was whether or not the commerce clause attaches merely because of an attempt to afterwards deal in interstate commerce. However, in the case at bar, the Supreme Court of the State of Mississippi, in its findings of fact, admits that no question existed but that the gasoline was shipped across the state line and that furthermore when it was purchased the intention was to so make this shipment.

Arguing on the first point raised by the appellee, we call to the court's attention the many, many times that this court has held that it does not construe commerce in any restricted sense, that under its construction commerce is

something more than transportation, that commerce means intercourse and embraces the sale, as well as the transportation, and although the appellee has contended that this definition applies to cases other than tax cases, we submit that this is the firm ground upon which this court has extended the protection of the commerce clause to all classes of litigants whether the question involved is a tax or not. Therefore, the question as to what constitutes commerce, or rather interstate commerce, is not what was the residence of the parties to the original transaction, but what was the nature and purpose of the sale and the after acts with reference to the article sold. We call to the court's attention here, the case of *DiSanto v. Pennyslvania,* 273 U. S. 34; 71 L. Ed. 524, cited on page 13 of our original brief. In this case DiSanto lived in Pennsylvania and he sold a ticket to a man in Pennsylvania, however, the sole purpose of the sale of the ticket was that it might transport the man across the borders of the State of Pennsylvania into a foreign country. While the people were then residents of Pennsylvania, the subject matter of the sale had exclusive reference to commerce going without the state and the court unhesitatingly held that a tax on this commerce could not be upheld.

In *Spaulding v. Edwards,* 262 U. S. 261; 67 L. Ed. 865, the sale of the goods was consummated in New York between two citizens of New York and the title passed in New York; however, even as the packing company in Biloxi acted for a fisherman in Louisiana, one of the parties in New York acted for a principal in a foreign country and the goods were immediately delivered for transportation to a foreign

country, even as the goods in this case immediately after the sale were delivered to a schooner for transportation to a different state, and although the tax in this case was one that would be upheld with reference to a transaction wholly taking place in New York, the court refused to allow it to be sustained as against the sale of the goods which were afterwards transported in interstate commerce.

With the exception of the fact that the goods in the Spaulding case were delivered to a steamship line and transported to a foreign country, the case is absolutely analagous to the case at bar. In the case at bar, we have a fisherman in Louisiana ordering gasoline from a factory-man in Biloxi. In the Spaulding case, a man in a foreign country ordered certain goods from his agent in New York. In the case at bar, the factory owner at Biloxi immediately ordered the delivery of these goods to the only means of transportation possible, a schooner. The goods were so delivered and a bill of lading signed. In the Spaulding case, the agent immediately purchased the goods and ordered them delivered to a steamship line and they were so delivered. In the case at bar, the gasoline without question was at once transported to Louisiana and delivered to the man who had requisitioned it, and in the Spaulding case, the goods were immediately shipped by steamship to a foreign country and delivered to the man who ordered them. The facts are identical, and if the transaction of the Spaulding case was interstate commerce protected as such by the commerce clause, certainly the same rule would apply in the case at bar, and we respectfully submit that if there was no case heretofore decided involving this question by this Honorable

Court, except the case of *Spaulding v. Edwards,* that this would be overwhelming authority in support of the contention of the appellants.

Everything that a man does must have a beginning and an ending. For instance, a man is born, lives his life and afterwards dies. He takes a journey and when it is concluded reaches a destination or returns home. He enters into a public office and at the expiration of his term retires. Likewise, in commerce there is a beginning and an ending of it. No logic, whether legal or otherwise could possibly set the beginning point at any place other than contract of sale and this court has in every pronouncement made by it said that the beginning of a transaction in interstate commerce was the sale, even as by the authorities quoted by the appellee it has held that the ending was the delivery and the coming to rest of the property at its point of destination, and the mere fact that there might be some diversion of the goods after the sale, when as a matter of fact there was not such diversion, does not prevent the entire transaction from being interstate commerce.

We call to the court's attention the following cases as absolutely sustaining this answer to the appellees argument on the points above considered: *Danke-Walker Milling Co. v. Bondurant,* 257 U. S. 282; 66 L. Ed. 239; *Lemke v. Farmers Grain Co.,* 258 U. S. 50; 66 L. Ed. 458; *Texas & N. O. Railway Co. vs. Sabine Tram. Com.,* 227 U. S. 111, 57 L. Ed. 442; *Foster-Fountain Packing Co. v. Haydel,* 73 L. Ed. 1; *Hughes Brothers v. Minn.,* 272 U. S. 469; 71 L. Ed. 359; *Pennsylvania v. West Virginia,* 262 U. S. 553, 67 L. Ed. 1117; *U. S. v. Hill,* 248 U. S. 420, 63 L. Ed. 337.

With reference to the second point that seems to be advanced by the appellee in its brief, that is, that the bill of lading was signed by the master of a boat owned by the one who acted in the purchase of the gasoline, we suggest to the court that if you ignore the bill of lading in this case, you would come to the same conclusion as a bill of lading is not absolutely necessary to constitute a transaction in interstate commerce. It is only one of the incidents to such a transaction but can be ignored for the simple reason that no third person has to act in order to constitute a transaction in interstate commerce between two persons and in fact one person alone by himself can engage in interstate commerce. For this reason we will consider this question along with the third point raised by the appellee, that is, that a different rule applies where a shipment is made by means other than that of a common carrier.

In presenting this question to the court, certainly we have to call to the court's attention the fact that the commerce clause, although it has been great enough to broaden with the advancing ramifications of business and industry in America in such a way as to have protected that advancement probably more than anything else in the history of progress in the United States, still must be viewed as having application to the manner and method that business was conducted at the time when it was first given authority by the adoption of the Constitution of the United States. At that time and for many years afterwards very little, if any, commerce was carried on in these United States by common carriers, considering common carriers within the meaning of the strictest construction placed on same by the appellees.

We had no railroads and very few, if any, ship lines and intercourse between the states and commerce between the states in most cases was carried on wholly by means of instrumentalities furnished by those persons engaging in such commerce, so were we to transport the scene of this question back one hundred twenty-five years, would it not be a ridiculous argument to present to the court that although an article was purchased for transportation without the state and although it was so transported, that the commerce in it was not interstate in nature for the reason that the agent of the man who used it without the state furnished the means of its transportation without the state. In other words, if a man was in Biloxi, Mississippi, and bought a carload of gasoline and shipped it over the Louisville and Nashville Railroad Company to New Orleans, Louisiana, according to the contention of the appellees this would be interstate commerce, but were the same man to make this purchase and immediately load it on a schooner owned by him and carry it to his principal in New Orleans by means of this schooner, this would not constitute such commerce.

We call to the court's attention here the case of *Pan Handle Oil Co. vs. State of Mississippi*, 277 U. S. 218, 72 L. Ed. 857, which was the case that this suit was originally predicated upon. In that case Your Honors expressly held that even though this might be called an excise tax or a tax measured by the gallonage of gasoline sold, that in fact it was a tax upon the sale itself which of necessity must be paid by the one purchasing the article. In other words, while a tax was charged against the Superior Oil Company in the case at bar it would have to be charged of necessity

in the usual business dealings against the fisherman who used this gasoline in the State of Louisiana.

Therefore, taking a view of the whole situation prevailing at the time of the sale of the gasoline we find not only were food, clothing and fuel transported by the only possible means from Biloxi to the fisherman in the southern part of Louisiana, this transportation taking place across the common waterway used by the citizens of all states, but that in return for these articles through the labor of these fishermen there were brought back to Biloxi large quantities of shrimp and other sea foods taken by the labors of these fishermen from the waters of the sister state of Louisiana. Not only does the fact of the sale and transportation of the gasoline in this case show an act of interstate commerce, but this whole transaction is the very essence of that business dealing and intercourse between states which it was the desire of the framers of the Constitution to protect. Here are men who went to Louisiana, they fished in its waters, they brought wealth from these waters, this wealth was transferred to Mississippi and in return we supplied them with some of the means by which they operated the instrumentalities used in this business. Therefore, what difference did it make whether there was a bill of lading or was not a bill of lading, or whether the goods were transported on a boat exclusively devoted to the purpose of a common carrier or not. By what other means could intercourse be carried on between Biloxi and that part of Louisiana called the Louisiana Marsh? The records show that no railroad lines ran there, necessity did not demand any exclusive boat lines there, but from the very necessary conduct of the whole

scheme of commerce existing and of the intercourse between the two states, the boats which brought in catches of shrimp and oysters took out food, gasoline, etc., as is shown by the record. We say that this constitutes commerce in its broadest sense and in-so-far as the sale of the gasoline was concerned there could be no commerce without a beginning and this beginning was the sale.

We refer the court to *U. S. v. Hill*, 248 U. S. 420, in which the court in part says:

> "The transportation of one's own goods from state to state is interstate commerce and as such subject to the regulatory power of Congress."

We find the above holding sustained in the case of *U. S. v. Simpson*, 252 U. S. 465, 64 L. Ed. 665, and in the case of *Kermeyer v. Kansas*, 236 U. S. 568, 59 L. Ed. 721, 35 Sup. Ct. Rep. 419. In the latter case it was held that a man transporting his liquor from one state to another state by means of a horse-drawn vehicle owned by himself was engaging in interstate commerce, although the means that he was using was merely a subterfuge to avoid the restriction of the law of Kansas prohibiting his engaging in business in Kansas. The court in part used the following language:

> "The fact that goods were transported in the owner's conveyance is not conclusive that it is not interstate commerce. Thus, the transportation of oil through various states by means of a pipe line has been held to be interstate commerce, although the oil belonged to the owner of the lines where this oil was purchased by the owner and

was transported for the purpose of being sold. Pipe Line Cases, 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. Rep. 956."

And, we find that in the case of *U. S. v. Chicago M. & St. P. Railroad Co.*, 149 Fed. 486, that a railroad company engaged in hauling its own rails upon its construction trains across the state line is engaged in interstate commerce.

In *Brooks v. U. S.*, 267 U. S. 432, 69 L. Ed. 699, the court held that interstate transportation by means of a motor vehicle by a person who knew same to be stolen was interstate commerce.

We also call to the court's attention the case of *Flannigan v. Federal Coal Co.*, 267 U. S. 222, 69 L. Ed. 583, which was a case in which the same right to have diverted the shipment as existed in this case, but the court held that this alone could not change the facts shown to be interstate commerce merely because of this power of diversion.

In *Public Utilities Corp. v. Attleboro*, 263 U. S. 83, 71 L. Ed. 549, the court held that the transmission of electricity from one state to another is interstate commerce, although custody and title were transferred from vendor to purchaser at the state boundary.

We therefore respectfully suggest to the court that it is not the means by which an article or person is transported from one state to the other that is decisive of whether or not such transportation is interstate commerce but it is the intention of the parties, the act of transportation and the

purpose to engage in intercourse of some nature with another state which governs, and in the case at bar, from the time the fishermen in Louisiana, as shown by the record, requisitioned said gasoline a chain of circumstances arose, as shown by the record in this case, every one of which was an incident of interstate commerce; the second of these circumstances, that is, the order and sale of the goods by the Superior Oil Company to the packing house, being the most necessary one in the whole chain of circumstances for the consummation of the transaction. There could have been no transportation without a sale; therefore there could have been no interstate commerce in this case without a sale and as this court, in *Pan Handle Oil Co. v. State of Mississippi*, quoted above, held that the tax was directly upon the purchaser of the gasoline under this very law, then the minute the sale was made and the goods were launched into interstate commerce they went forth with the burden of the excessive tax upon them. There is some weak contention made in the brief of the appellee that you can divorce the sale from the transportation, and if you do so you have a case where gasoline is stored in Mississippi and in the usual course of business the owner of the gasoline sells to a packing plant here and thereupon the tax springs into existence; that there is no interstate commerce then but only such commerce after this sale has been consummated and the goods delivered into the hands of the purchaser.

There is no basis for this argument as in passing on what is interstate commerce this court will not judge it by any one incident in the chain of circumstances making it up. There might have been some merit to this contention on the

part of the appellee if the packing company had been in the habit of purchasing large quantities of gasoline, storing it in their warehouses here and later on, at various and divers times, shipping it to Louisiana as the occasion demanded, but in the case at bar there was no such fact. Not only was every circumstance of the sale directly and intimately connected with the transportation which carried it from one state to the other, but there was no pause in the voyage of the oil from the station of the oil company until the time it was delivered to the boats of the fishermen in the waters of Louisiana. There is no suggestion in the record that there was even a thought in the minds of the purchasers or sellers of this gasoline, except that it was going to be immediately transported to the decks of the schooner and by means of the schooner to the waters of Louisiana. It does not matter whether or not the Superior Oil Company had any interest in the gasoline or any right to its control after it was delivered by it on board the schooner. The protection of the commerce clause extends to this corporation as their first dealing in this gasoline was in pursuance of a sale which required them to start the gasoline on an interstate commerce journey and this journey was completed. In *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, the court in part said:

> "The lumber was ordered, manufactured and shipped for export. And we say ship for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipper was a perfectly natural one, and did not change the relationship of the power company to it, and make

the lumber other than lumber purchased at Ruliff and started from there in transportation to a foreign destination."

We therefore submit to the court that the facts shown in this record constitute intertsate commerce from the minute that the goods were ordered until the time of the delivery in Louisiana and that for this reason the question of the validity vel non of the bill of lading or of the necessity for it has no bearing on the construction that will be placed by this court on the facts shown in the record. In taking this position, we do not concede that it was not competent for us to contract and to sell gasoline so that while a partial delivery was made here actual title passed in another state, and in support of this contention we cite to the court: *Harkness v. Russell*, 118 U. S. 663, 30 L. Ed. 285; *U. S. v. Woodruff*, 89 U. S. 180, 22 L. Ed. 863; *Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928; *Williston on Sales*, Second Edition, Vol. 1, para. 259; *Weston Oil Co. v. Lipscomb*, 244 U. S. 346, 61 L. Ed. 1181.

We therefore say in conclusion that there is no merit in the contention of the appellee that it is the duty of this court to take one continuous transaction and because it can be separated so as to make valid a state tax to separate it. Appellees say that the sale can be separated from the transportation because it is a separate contract. In the *Texas & N. O. R. R. Co. v. Sabine* case, the court could have separated the sale by Sabine Tram. Co. the Powell company but held that it would not separate it because it was a part of a continuous transaction. In the case at bar, the court could separate the sale from the transportation, could separate

the transportation from the delivery, but were it to do so it would announce a doctrine that there could be no interstate commerce unless it consisted of one inseparable act. This is not the law, as decided time after time by Your Honors, but on the contrary every essential detail which enters into a transaction in interstate commerce from the soliciting of the order, the actual making of the sale, the delivery to the transportation company or personal delivery and the actual reception of the goods, if done in continuity together make up a transaction, the whole of which constitutes interstate commerce.

We therefore respectfully suggest that there is nothing either in law or fact shown in the brief of the appellee which in anywise sets aside the overwhelming authorities cited in the original brief of the appellant supporting the contention of the appellant that the sale of the gasoline by the Superior Oil Company was a sale in interstate commerce and if this be true the appellee admits that under the laws of the United States such sale is not taxable, and if the statutes complained of are applied to or so construed as to embrace such a sale or transaction then clearly to this extent the same is unconstitutional.

We respectfully submit that the judgment appealed from should be reversed for the reasons hereinbefore set out.

W. LEE GUICE,
W. H. WATKINS,
JOHN L. HEISS,

Attorneys for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY,
Appellant,

vs.

STATE OF MISSISSIPPI, EX REL,
GEORGE T. MITCHELL, ATTORNEY GENERAL,
Appellee.

NO. 28

STATEMENT AND BRIEF FOR THE APPELLEE.

GEORGE T. MITCHELL,
Attorney General of the
State of Mississippi.

JAMES W. CASSEDY, Jr.,
Assistant Attorney General.

E. C. SHARP,
Counsel for Appellee.

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SUMMARY

Point One

The interstate commerce rule does not apply to gasoline shipped from another state after the original package is broken, and the gasoline mingled with other gasoline, or sold in broken quantities.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095 43 Sup. Ct. Rep. 643;

Bowman v. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355.

Point Two

The State of Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser on both being residents of the same state and the sale being completed in the same state and does not thereby place a burden upon interstate commerce, even though the purchaser moves the gasoline to another state.

Sonneborn Brothers v. Keeling, Attorney General, 262, U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643.

Banker Brothers v. Pennsylvania, 222, U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

Kuhn and Son, Inc., v. Letts, 50 App (D. C.), 104, 267 Fed. 748, 749;

12 Corpus Juris, page 26 and 27, paragraph 25;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355:

Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct., Rep. 403.

Point Three

The State of Mississippi has the power to tax the privilege of engaging in the sale and distribution of gasoline in such state.

Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 68 L. Ed. 593, 44 Sup. Ct. Rep. 251.

Point Four

The state's power to tax property is not destroyed by

the fact that it is intended for and will move in interstate commerce.

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186.

Point Five

The contracts for the sale and delivery of gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to be exempt from state taxation (where the state taxes such sales) under the commerce clause (Article 1, Section 8, Clause 3) of the United States Constitution.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

State of Mississippi v. Superior Oil Company, 119 So., 360.

Banker Brothers Company v. Pennsylvannia, 222 U. S. 210, 56, L. Ed. 168, 32 Sup. Ct. Rep. 38;

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State Tax on Railway Gross Receipts, 15 Wall, 284, 21 L. Ed. 164.

Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382.

Point Six

A tax without descrimination on the sale of gasoline after the interstate transportation ceases or before the interstate transportation begins is not a burden on the interstate commerce where such sales were entirely contracted for and completed in the State of Mississippi.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186;

Banker Brothers Company v. Pennsylvania 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

State Tax on Railway Gross Receipts, 15 Wall, 284, 21 L. Ed. 164.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY,
Appellant.

vs.

STATE OF MISSISSIPPI, EX REL,
GEORGE T. MITCHELL, ATTORNEY GENERAL,
Appellee.

NO. 28

STATEMENT AND BRIEF FOR THE APPELLEE.

STATEMENT

Official Report, 119 So., 360.

"Appellant, the State, on relation of the Attorney General filed the bill in this case in the chancery court of Harrison County against appellee to recover of the latter gasoline excise taxes alleged to be due appellant by appellee for the period between the 1st day of April, 1926, and the 1st day of November, 1927, under the provisions of chapter 119, Laws of 1926, and the statutes of which that act was amendatory. The case was tried on bill, answer, and proof, resulting in a final decree dismissing appellant's bill. From that decree appellant prosecutes this appeal.

"Appellee contended, and the chancellor held, that for the state to impose the excise tax sought to be recovered by the appellant would violate paragraph 3, section 8, article 1, of the Constitution of the United States, which confers on Congress the power to regulate commerce among the several states.

"If appellee was due the state any gasoline excise taxes when the bill in this case was filed, it was for gasoline sold by appellee to certain packers of sea food at Biloxi, and by the latter shipped into Louisiana. As to all such gasoline, the appellee contends that the contracts of sale and purchase thereof were part of interstate commerce, and, therefore, under the commerce clause of the federal Constitution, the state was without power to burden such commerce by imposing excise or privilege taxes thereon. While Appellant contends that, under the facts of the case, the contracts for the sale and purchase of such gasoline were no part of, and had no relation whatever to, interstate commerce, and that, therefore, the gasoline sold was taxable under chapter 119, Laws of 1926, and the statutes of which that act was amendatory, as if it had been sold in and had never left this state.

"There was no conflict in the evidence as to the controlling facts, which were as follows: Several packers of sea food, doing business in and near Biloxi, bought large quantities of shrimp and other sea food from fisherman engaged in fishing therefor out in the marshes near Grant's Pass, in the State of Louisianna. It was necessary for these fishermen to be supplied with gasoline and other supplies while they were engaged in making their catch. The packers who bought their catch furnished this gasoline and other necessary supplies, to be paid for when their catch was brought in and purchased by the packers. These packers owned boats which plied between Biloxi and Grant's Pass. They purchased gasoline from appellee and others, and transported it to the fishermen in such boats, which would take the gasoline out into the Louisiana marshes near Grant's Pass, and there deliver it to the fishermen, to whom it was charged by the packers, and, by the fishermen, paid for as stated. On the trial, it was agreed between the parties that the transactions had between appellee and the Gussie Fontaine Packing Company exemplified the

manner in which appellee sold and delivered to the packing companies all the gasoline involved in this cause. The Gussie Fontaine Packing Company bought shrimp, and, perhaps, other sea food, from fishermen in Louisiana near Grant's Pass. The fishermen needed gasoline, and the packing company would purchase the required amount from appellee on open account to be paid for on the first of the succeeding month. Appellee would then deliver this gasoline in containers on the wharfs at Biloxi to the packing company, where it would be loaded into its own boat and transported to its fishermen. The fishermen would come in about every two weeks, and the packing company would then have a settlement with them, in which they would be charged with the gasoline so delivered to them by the packing company, and credited with the amount due them by the packing company for their catch. The boat owned by the Gussie Fontaine Packing Company, the Frank Louis, was not a common carrier of freight, but was used by the packing company alone for its own purposes, principally for transporting supplies, including gasoline, to its fishermen between Biloxi and Grant's Pass which boat was registered as a fishing boat. When the Gussie Fontaine Packing Company purchased gasoline from appellee for transportation to Grant's Pass for the purposes named, it executed and delivered to the appellee a receipt or bill of lading as follows:

" 'No. 4882 Biloxi, Miss., Dec. 20, 1927.

" 'Received in good order and condition from Superior Oil Company, Biloxi, Miss.,

" 'No. pieces Description of Articles Weight

" '2. drums gasoline

" 'Consigned to Gussie Fontaine Pkg. Co., destination Grant's Pass., La., by Boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co. The master of said boat, Frank Louis, acknowledges receipt of

said goods and agrees to deliver merchandise as consigned in like good order and condition.

" 'It is further understood and agreed that the property consigned herein remains the property of the said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination, but that all due caution and carefulness will be exercised by master and crew of said boat Frank Louis to protect said property and effect a safe delivery without undue delay.

" 'In said consideration of the packet rate charged for carrying property described herein the owners of this boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit caused by carelessness or negligence this damage and loss shall be sustained by owners of boat accepting this shipment.

" '366-537 (Signed) Joseph Adams,
" 'Master of Boat Frank Louis.

" 'Received $——Collect——to apply in prepayment of packet charges, on property hereon described from Biloxi, Miss., to Grant's Pass, La. For Master of Boat.' "

"Appellee is a corporation located and doing business in Biloxi, Harrison County, Miss., selling and distributing gasoline at both wholesale and retail. The Gussie Fontaine Packing Company is also a corporation located and doing business in Harrison County, Miss.

"It will be seen from what has been stated that the Gussie Fontaine Packing Company purchased its gasoline from appellee to be delivered to it on the wharf at Biloxi, where it was received by the packing company's boat, loaded therein, and transported to Grant's Pass, and there sold to the packing company's fishermen. No freight was paid by either the appellee or the packing company. There was no depot or sta-

tion at Grant's Pass, or anywhere else in the Louisiana marshes, to which goods shipped could have been consigned. Grant's Pass was merely a touching point for boats, but not a place of business for the receipt and distribution of freight. There was no common carrier of freight, either by rail or water, between Biloxi and Grant's Pass.

"Putting the facts of the case in a short way: Appellee, a corporation of this state, doing business at Biloxi, sold the gasoline involved in this case to various packers of sea food also located and doing business at Biloxi, and charged the purchase price to the packers on open account payable at the end of the succeeding month. Under the contracts of purchase, the appellee delivered the gasoline on the wharfs at Biloxi where it was loaded by the packers into their own boats, and by such boats transported to the fishermen supplying the packers with sea food for packing purposes. The fishermen were plying their avocation in the Louisiana marshes near Grant's Pass. The packers sent the gasoline out there, and sold and delivered it to their fishermen who paid for it as stated. In other words, the sales and purchases of the gasoline were between the parties doing business in this state, and were negotiated and consummated between them in this state, unless it can be said that the reservation of title to the gasoline in the appellee, by the terms of the bills of lading issued by the purchasers until it was delivered at Grant's Pass, changed the transaction from a domestic one to an interstate commerce transaction.

"The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grant's Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and the purchase of gasoline between the ap-

pellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline, as set out in the bills of lading therefor issued by the boat master of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing.

"The title to the gasoline was not reserved in the appellee for the purpose of securing the payment of the purchase price thereof. There is no pretense of that kind on the part of the appellee. Nor was it retained for any other purpose, so far as the record shows, unless it was a means of trying to convert purely domestic transactions into interstate commerce transctions. The packers, as stated, transported the gasoline into Louisiana by means of their own boats, which were not common carriers, and no freight was paid by either the appellee or the packers for such transportation. Under the stipulations in the bills of lading, the packers assumed all responsibility for safe delivery of the gasoline to their fishermen, including all damage thereto in loading and unloading and transferring same, and loss by leakage in transit. What protection or security did the reservation of title until delivery of the gasoline to the consignee afford appellee? What, if anything, did appellee gain, or what could it have gained by it? We are unable to see any. Mr. Royster, the general manager of appellee, in effect, confessed, as a witness for his company, that the retention of title in the bills of lading was for the pur-

pose of converting transactions exclusively domestic in their nature into transactions in interstate commerce.

"We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another state. It is much more difficult when the purchaser retain control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidently on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out. It is true that the mere power of a shipper to divert a shipment already begun does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith, nor does a temporary interruption of the passage when reasonable and in furtherance of the intended transportation. Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 47 Sup. Ct. 170, 17 L. Ed., 359; Champlain Realty Co. v. Brattleboro, 260 U. S. 364, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; Railroad Co. v. Mims, 111 Miss. 574, 71 So. 827.

"In Browning v. Waycross, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a non-resident manufacturer of such rods, in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license without violating the commerce clause of the federal Constitution, although such contracts bound the seller, at his own expense to attach them to the houses of persons who ordered them. The court fur-

ther held that in that case that it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.'

"We do not think that United States v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510; United States v. Hill, 248 U. S. 420, 39 S. Ct. 143, 63 L. Ed. 337, Kirmyer v. Kansas, 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721, are in point. Those cases simply hold that intoxicating liquor transported across state lines was interstate commerce, regardless of what the purpose was in so transporting the liquor. That is not the question here. The gasoline involved in this case, immediately after its purchase by the packers, moved in interstate commerce; it was purchased with that intention. Both the seller and the purchaser knew that the gasoline was going to move across the state line into Louisiana. But, what did that have to do with the contracts of sale and the purchase? If the appellee, under the contract, had any real substantial part in the transportation of the gasoline into Louisiana, that would make them interstate commerce transactions. But, the evidence shows, beyond any doubt, that appellee had no part in the transportation. It simply delivered the gasoline to the packers in this state, who took charge of it and transported it into another state. All the appellee has to hang to to make interstate commerce transactions out of these sales of gasoline is the stipulation in the bills of lading providing for the retention of title in appellee until the gasoline should be delivered to the consignee at Grant's Pass, Louisiana, and this stipulation stands right in the face of the undisputed fact that there was no consignee, at or near Grant's Pass. And, furthermore, as shown, the gasoline was delivered by the appellee to the packers on the wharves at Biloxi, in this state, and there the packers, by means of their boats, took charge of it and transported it to Grant's Pass for sale to their fisher-

men, but that they were under no enforcible obligation to appellee to do so. There were free to transport the gasoline to any other point in or out of the state. The gasoline, in other words, was delivered to the consignees right here in the state, on the wharves at Biloxi, and, therefore, the provision in the bills of lading, fixing Grant's Pass as the place of delivery, was no more than so much blank space. The packers purchased the gasoline from the appellee in this state, and paid for it. What real concern, therefore, did appellee have as to where the gasoline was to be transported, and by what means? We can see no reason whatever. The contracts of purchase and sale were complete when the gasoline was delivered on the wharves in this state. No security was demanded by, or given appellee, by the packers for payment of the purchase price. Under the provisions of the bills of lading, the entire risk of loss in transportation was assumed by the packers, and, if that had not been done, it seems that any loss in transit would have fallen on the packers, because the gasoline was being carried in their own boats.

"We cannot give our assent to the proposition that the bare fact, that the appellee and the packers went through the form in the bills of lading of providing that the title to the gasoline should remain in appellee until delivered to the consignee at Grant's Pass, made the contracts of sale and purchase of the gasoline interstate commerce transactions. We think there is little substance in that position. It is too shadowy. It is without sound reason.

"It follows from these views that the suggestion of error should be sustained, and the judgment heretofore rendered in this case by this court set aside, and that this court should now render the judgment that the court below should have rendered, which is that the appellant recover of the appellee the sum of $25,-254.98 with 6 per cent. interest from November 1st, 1927, representing the amount shown by the evidence to be due by the appellee to the state for the taxes sued

for. Reversed and suggestion of error sustained; former judgment in this case set aside; decree of court below reversed and decree here for appellant."

Section 2, Chapter 115, Mississippi Laws of 1924 is as follows:

> "Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of three cents (3c) per gallon upon the sale of gasoline by such dealer in this state, except, however, such gasoline as is brought into this state and sold in original packages or otherwise in interstate commerce, or such as is purchased outside of the state and brought into this state in original packages, or otherwise by the consumer for his own use shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer."
>
> "Nor shall the distributor pay such tax when the same is paid by the retailer."

Section 1, Chapter 119, Mississippi Laws of 1926 is as follows:

> "Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4c) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer."

Section 3 of said Chapter and Act is as follows:

> "This act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this state to an-

other state or nation, nor to require the inclusion in the measure of tax any gasoline shipped in interstate commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another state or person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this state. Provided, that distributors making shipments of gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the state auditor of public accounts."

Clause 3, Paragraph 8, Article 1, of the Constitution of the United States is as follows:

"To regulate commerce with foreign nations and among the several states and with the Indian tribes."

STATEMENT OF THE CASE BY COUNSEL FOR APPELLEE.

This suit was instituted by the State of Mississippi on the relation of Rush H. Knox, Attorney General, against the Superior Oil Company, a corporation chartered under the Laws of the State of Mississippi and domiciled at Biloxi, Harrison County, Mississippi. The petition alleges that the Superior Oil Company was engaged in business as a distributor and a retail dealer in gasoline in Harrison County, Mississippi, and that it has engaged in the sale of gasoline in broken quantities as shown by Exhibit "A," all of which sales were made in the State of Mississippi (Pages 1, 2, 3, 4, 5, and pages 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 of the transcript of record).

Chapter 115, Mississippi Laws of 1924 and Chapter 119, Mississippi Laws of 1926, quoted herein on pages

14-15, inclusive, provides that on each distributor and retail dealer in gasoline a tax of 3c and 4c per gallon on the sale of all gasoline in the State of Mississippi, which is not shipped in interstate commerce.

The petition of the State of Mississippi sought to recover from the Superior Oil Company the tax due under the laws of the State of Mississippi for the sales of gasoline as shown by Exhibit "A".

The answer filed by the Superior Oil Company admits that it was a distributor and retail dealer in gasoline in Harrison County, Mississippi. (Page 6 of the transcript of the record). The answer denies that it is due the State of Mississippi any amount of taxes on the sale of gasoline as alleged in the petition filed by the State of Mississippi. The answer alleges that the sales of gasoline upon which the State of Mississippi sought to recover the tax were in interstate commerce and exempt from state taxation; the circumstances of the interstate commerce being as follows:

> "That situated in Biloxi are a large number of canning interests who have found it necessary to use large quantities of gasoline in the State of Louisiana and Alabama for propelling boats used therein for catching oysters and shrimp. That various persons engaged in this business secured from the defendant an agreement to furnish them all gasoline consumed or sold by them in the State of Louisiana, and this gasoline was furnished in the following manner: After the order for said gasoline had been given to the defendant, the defendant would then in excess of all their domestic gasoline used by it, order the shipment of certain cars from points in Texas, Louisiana, or Arkansas, which gasoline, after its arrival in Biloxi, Mississippi, would be by the defendant placed in a storage tank and withdrawn thereafter in fifty-gallon iron barrels and shipped by means of a freight boat, this being the only manner of transportation to the fishing district of Louisiana to various

points in the Louisiana marsh; who thereupon used or sold said gasoline to boats fishing in Louisiana, consigned to the purchaser of gasoline, and by means of said common carrier would make delivery of said shipment to said purchaser in Louisiana. A form of the bill of lading in such transportation being hereto attached to this answer and marked Exhibit "A" and prayed to be taken as a part hereof." Tr. Rec. 8 and 9.

It is alleged by the answer of the Superior Oil Company that the sale of gasoline under these circumstances was excepted from the payment of any tax due the state of Mississippi, the language of the answer being as follows:

> "That by reason of said manner and method of the sale of gasoline in export or Interstate Commerce the defendant was wholly excepted from payment of any privilege tax due on gasoline, this exception being granted by Section 3, Laws of 1926, being Chapter 119."

The answer states in regard to the right of the state to collect the excise tax on these sales of gasoline, the following:

> "And which laws if it in any manner seeks to tax or if it is the purpose of the said laws to tax sales of gasoline made for export or Interstate Commerce as hereinabove set forth, is illegal, invalid, null and void as a burden upon Interstate Commerce, in direct conflict with Clause 3, of Paragraph 8, Article 1 of the Constitution of the United States, which provides that Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes,"

An agreement by counsel for the appellant and the appellee in regard to the testimony in this case appears on page 51 of the transcript of the record as follows:

"Stipulation Re Testimony, Etc.

For the purpose of shortening the record it is hereby agreed that all of the shipments shown on the report and all of the sales shown on the report marked Exhibit "A" and filed in this cause were handled in the same manner as shown by the testimony already introduced, and it is agreed that the witness would testify that each and every sale reported as non-taxable was sold and handled in the manner already testified to, and that the boats carrying gasoline were and are classified by the United States Government as being engaged in fishing. It is further agreed that if the defendant, if liable, it is liable only on shipments to Louisiana, and not to shipments to Alabama, and if liable at all, is liable on all of shipments to Louisiana as shown by Exhibit "A".

The manner in which the gasoline was sold by the Superior Oil Company appears to be a number of sales similar to the following illustration taken from the transcript of the record. The fishing and packing companies domiciled and located at Biloxi, Harrison County, Mississippi, may be illustrated by the Gussie Fontaine Packing Company which purchased gasoline from the Superior Oil Company (page 33). On page 44 and 45 of the transcript of the record the following testimony of a manager of a packing company appears:

"Q. That is packing plant at Biloxi, Mississippi?

A. Yes.

Q. You have been buying considerable gasoline from the Superior Oil Company also domiciled at Biloxi during the past two years have you?

A. Gasoline and crude oil.

Q. Explain to the Court how that transaction is handled—gasoline?

A. Most of my boats burn crude oil, as well as gasoline.

Q. I don't care about crude oil.

A. When freight outside, buy several drums of gasoline and put on boat and take it to Grant's Pass and from there distribute it among other boats.

Q. As I understand it, you go to the office at Superior Oil Company, and say you want to get so many gallons of gasoline, and you buy it and have it delivered to your boats?

A. In full drum lots.

Q. And your boats take it to Grant's Pass?

A. Yes, and get clearance from State of Louisiana, and then go out. We buy gasoline in broken lots and then put it in boats and they use that to go out. Full drum lots are put on that boat and delivered to Grant's Pass and distributed among other boats, and if they have to use any themselves they break it.

Q. Place order there in Biloxi with Superior Oil Company for so many gallons of gasoline?

A. So many drums.

Q. Deliver at your wharfs or theirs?

A. Delivered to boats and boats sign bill of lading for Grant's Pass.

Q. These are fishing boats?

A. Ours are nothing else."

The boats owned by the packing company are not common carriers, but are fishing boats (page 45, also agreement of counsel page 51). The gasoline purchased by the packing company is charged to it, and it pays the Superior Oil Company (page 45). The expenses of operating the boat are paid by the packing company (page 45). No freight charge is made by the packing company in handling the gasoline (page 46). The gasoline is resold by the packing company's boats to fishermen located near Grant's Pass, Louisiana, (page 46). The packing company has an arrangement

with the fishermen to furnish them gasoline near Grant's Pass, Louisiana, and the fishermen furnish the packing companies shrimp and oysters at Biloxi (page 49). The manager of the Superior Oil Company testified on page 43 in answer to the question,

"Q. But paid no tax in Mississippi or Louisiana?

A. We did not operate in Louisiana and were not called on to pay tax in Louisiana."

He further testified on the same page in answer to a question,

"Q. When you deliver it, it becomes his property?"

A. Yes."

The majority opinion of the Supreme Court of the State of Mississippi uses the following language in stating the pertinent facts involved in this case, page 61, 62, 63, 64, 65, 66, 67, 68 of the record. A portion of this opinion is as follows:

"There was no conflict in the evidence as to the controlling facts which were as follows: Several packers of seafood, doing business in and near Biloxi, bought large quantities of shrimp and other seafood from fishermen engaged in fishing therefor out in the marshes near Grants Pass in the State of Louisiana. It was necessary for these fishermen to be supplied with gasoline and other supplies while they were engaged in making their catch. The packers who bought their catch furnished this gasoline and other necessary supplies, to be paid for when their catch was brought in and purchased by the packers. These packers owned boats which plied between Biloxi and Grant's Pass. They purchased gasoline from appellee and others and transported it to the fishermen in such boats, which would take the gasoline out into the Louisiana marshes near Grant's Pass, and there deliver it to the fishermen to whom it was charged

by the packers, and, by the fishermen paid for as stated. On the trial, it was agreed between the parties that the transactions had between appellee and the Gussie Fontaine Packing Company exemplified the manner in which appellee sold and delivered to the packing companies all the gasoline involved in this cause. The Gussie Fontaine Packing Company bought shrimp and, perhaps, other seafood, from fishermen in Louisiana near Grant's Pass. The fishermen needed gasoline, and the Packing Company would purchase the required amount from appellee on open account to be paid for on the first of the succeeding month. Appellee would then deliver this gasoline in containers on the wharfs at Biloxi to the Packing Company, where it would be loaded into its own boat and transported to its fishermen. The fishermen came in about every two weeks, and the Packing Company would then have a settlement with them in which they would be charged with the gasoline so delivered to them by the Packing Company, and credited with the amount due them by the Packing Company, for their catch. The boat owned by the Gussie Fontaine Packing Company, the Frank Louis, was not a common carrier of freight, but was used by the Packing Company alone for its own purposes, principally for transporting supplies, including gasoline, to its fishermen between Biloxi and Grant's Pass, which boat was registered as a fishing boat. When the Gussie Fontaine Packing Company purchased gasoline from appellee for transportation to Grant's Pass for the purposes named, it executed and delivered to the appellee a receipt or bill of lading.

* * * *

"Appellee is a corporation located and doing business in Biloxi, Harrison County, Mississippi, selling and distributing at both wholesale and retail. The Gussie Fontaine Packing Company is

also a corporation located and doing business in Harrison County, Mississippi.

"It will be seen from what has been stated that the Gussie Fontaine Packing Company purchased its gasoline from appellee to be delivered to it on the wharf at Biloxi, where it was received by the Packing Company's boat, loaded therein, and transported to Grant's Pass, and there sold to the Packing Company's fishermen. No freight was paid by either the appellee or the Packing Company. There was no depot or station at Grant's Pass, or anywhere else in the Louisiana marshes, to which goods shipped could have been consigned. Grant's Pass was merely a touching point for boats, but was not a place of business for the receipt and distribution of freight. There was no common carrier of freight, either by rail or water, between Biloxi and Grant's Pass.

"Putting the facts of the case in a short way—Appellee, a corporation of this state, doing business at Biloxi, sold the gasoline involved in this case to various packers of seafood also located and doing business at Biloxi, and charged the purchase price to the packers on open account payable at the end of the succeeding month. Under the contracts of purchase, the appellee delivered the gasoline on the wharfs at Biloxi, where it was loaded by the packers into their own boats, and by such boats transported to the fishermen supplying the packers with seafood for packing purposes. The fishermen were plying their avocation in the Louisiana marshes near Grant's Pass. The packers sent the gasoline out there and sold and delivered it to their fishermen who paid for it as stated. In other words, the sales and purchases of the gasoline were between parties doing business in this state, and were negotiated and consummated between them in this state, unless it can be said that the reservation of title to the gasoline in the ap-

pellee by the terms of the bill of lading issued by the purchasers until it was delivered at Grant's Pass, changed the transaction from a domestic one to an interstate commerce transaction."

ARGUMENT

Counsel for the appellant made a division of their argument into the following points: Point one for the jurisdiction. The appellee desires to make no argument upon this point. Point two the appellee admits. Point three the appellee admits. Point four is stated by counsel for appellant as follows: "The sale and delivery of gasoline by appellant in this case according to the established course of dealing was in a regular channel of interstate commerce and formed an integral part thereof." This point is divided into three divisions—(a) what constitutes interstate commerce; (b) interstate commerce comprises not only shipments, but negotiations and contracts in respect thereto; (c) interstate commerce is not dependent upon passage of title, neither does the same necessarily involve transportation by carrier. The opinion of the writer of this brief is that the argument of counsel for appellant does not apply to the present case as it will be hereinafter shown. The only point or question in this case is stated in the majority opinion of the Supreme Court of Mississippi as follows:

> "Appellee contended, and the Chancellor held, that for the state to impose the excise tax sought to be recovered by the appellant would violate Paragraph 3, Section 8, Article 3, of the Constitution of the United States, which confers on Congress the power to regulate commerce among the several states."

Point One

The interstate commerce rule does not apply to gasoline shipped from another state after the original package is broken, and the gasoline mingled with other

gasoline, or sold in broken quantities.

Sonneborn Brothers v. Keeling, Attorney General, 202 U. S. 506, 67 L. Ed. 1095 43 Sup. Ct. Rep. 643;

Bowman v. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355.

Point Two

The State of Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser both being residents of the same state and the sale being completed in the same state and does not thereby place a burden upon interstate commerce, even though the purchaser moves the gasoline to another state.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

Banker Brothers v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Reo. 38;

Kuhn and Son, Inc., v. Letts, 50 App (D. C.), 104, 267 Fed. 748, 749.

12 Corpus Juris, page 26 and 27, paragraph 25;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct., Rep. 355;

Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403.

Point Three

The State of Mississippi has the power to tax the privilege of engaging in the sale and distribution of gasoline in such state.

Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 68 L. Ed. 593, 44 Sup. Ct. Rep. 251.

Point Four

The state's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce.

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186.

Point Five

The contracts for the sale and delivery of gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to be exempt from state taxation (where the state taxes such sales) under the commerce clause (Article 1, Section 8, Clause 3 of the United States Constitution.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed 1095, 43 Sup. Ct. Rep. 643;

State of Mississippi v. Superior Oil Company, 119 So., 360,

Banker Brothers Company v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

Kuhn and Son, Inc., v. Letts, 50 App. (D. C.) 104, 267 Fed. 748, 749,

State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164,

Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382.

Point Six

A tax without discrimination on the sale of gasoline after the interstate transportation ceases or before the interstate transportation begins is not a burden on interstate commerce where such sales were entirely contracted for and completed in the State of Mississippi.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

LaCost v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186;

Banker Brothers Company v. Pennsylvania 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

State Tax on Railway Gross Receipts, 15 Wall, 284, 21 L. Ed. 164.

Argument on All Points Jointly

The facts in the case at bar do not present a contract for the sale and delivery of gasoline across the state line between Mississippi and Louisiana. The appellant sought by the terms of a bill of lading, which appears on page 13 and 14 of the transcript of the record, to make it appear that it did contract for the delivery of gasoline across the state line between Mississippi and Louisiana. In discussing this receipt the following language is used in the majority opinion of the Supreme Court of the State of Mississippi, which appears on page 65, 66, 67 and 68 of the transcript of the record as follows:

> "It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing.
>
> "The title to the gasoline was not reserved in the appellee for the purpose of securing the payment of the purchase price thereof. There is no pretense of that kind on the part of the appellee. Nor was it retained for any other purpose, so far as the record shows, unless it was a means of trying to convert purely domestic transactions into interstate commerce transactions. The packers, as stated, transported the gasoline into Louisiana by means of their own boats, which were not common carriers, and no freight was paid by either the appellee or the packers for such transportation. Under the stipulations in the bills of lading, the packers assumed all responsibility for safe deliv-

ery of the gasoline to their fishermen, including all damage thereto in loading and unloading and transferring same, and loss by leakage in transit. What protection or security did the reservation of title to the gasoline until delivery to the consignee afford appellee? What, if anything, did appellee gain, or what could it have gained by it? We are unable to see any. Mr. Royster, the General Manager, in effect, confessed, as a witness for his company, that the retention of title in the bills of lading was for the purpose of converting transactions exclusively domestic in their nature into transactions in interstate commerce. We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another state. It is much more difficult when the purchaser retains control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidentially on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out.

* * * *

"In Browning vs. Waycross, 233 U. S. 16, 58 L. Ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a nonresident manufacturer of such rods in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods which shipped into the state on such orders, may be subjected to a municipal license without

violating the commerce clause of the Federal Constitution, although such contracts bound the seller, at his own expense, to attach them to the houses of the person who ordered them. The court further held in that case that it was not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.'

* * * *

"But, the evidence shows, beyond any doubt, that appelle had no part in the transportation. It simply delivered the gasoline to the packers in this state who took charge of it and transported it into another state. All the appellee had to hang to to make interstate commerce transactions out of these sales of gasoline is the stipulation in the bills of lading providing for the retention of title in appellee until the gasoline should be delivered to the consignee at Grant's Pass, Louisiana, and this stipulation stands right in the fact of the undisputed fact that there was no consignee at, or near Grant's Pass. And, furthermore, as shown, the gasoline was delivered by the appellee to the packers on the wharfs at Biloxi in this state, and there the packers, by means of their boats, took charge of it and transported it to Grant's Pass for sale to their fishermen, but that they were under no enforcible obligation to appellee to do so. They were free to transport the gasoline to any other point in or out of this state. The gasoline, in other words, was delivered to the consignee right here in the state, on the wharfs at Biloxi, and, therefore, the provision in the bills of lading, fixing Grant's Pass as the place of delivery, was no more than so much blank space. The packers purchased the gasoline from the appellee in this state, and paid for it. What real concern, therefore, did appellee have as to where the gasoline was to be

transported, and by what means? We can see no reason whatever. The contracts of purchase and sale were complete when the gasoline was delivered on the wharfs in this state. No security was demanded by, or given appellee by the packers for the payment of the purchase price. Under the provisions of the bills of lading, the entire risk of loss in transportation was assumed by the packers, and if that had not been done, it seems that any loss in transit would have fallen on the packers, because the gasoline was being carried in their own boats.

"We cannot give our seent to the proposition that the bare fact that the appellee and the packers went through the form in the bills of lading of providing that the title to the gasoline should remain in the appellee until delivered to the consignee at Grant's Pass, made the contracts of sale and purchase of the gasoline interstate commerce transactions. We think there is little substance in that position. It is too shadowy. It is without sound reason."

The court will, of course, bear in mind that a bill of lading is an acknowledgment usually by a common carrier acknowledging the receipt of goods on board such carrier to be transported to a certain destination and there delivered to a designated person. In the present case, the so-called bill of lading is an absolute misnomer as well as a nullity, or if considered at all, can only be considered as a receipt of the goods by the packing company which purchased it from the appellant. I do not deem it necessary to discuss this bill of lading, as it is so-called, further than the citation from the majority opinion of the Supreme Court of Mississippi. However, this discussion in the majority opinion of the Supreme Court of Mississippi did not go into the theory of this case on which the writer of this brief believes the conclusion reached should be based. However, the conclusion does appear to be

correct. It seems that the Supreme Court of Mississippi merely considered whether or not the sale of gasoline by the appellant to the packing company was a part of interstate commerce, because the gasoline was moved by the packing company which purchased it from Biloxi, Mississippi, to the mashes of Louisiana. The conclusion reached by the Supreme Court of Mississippi was that these sales were not a part of interstate commerce as included in the commerce clause in so far as the taxing power of a state is concerned. I believe this conclusion to be correct. However, I do not believe that the sale of gasoline by the appellant to the packing company can be entirely disassociated from the rule of interstate commerce which includes the purchase and sale as much as it does the transportation. Yet in the present case, the sale was a domestic sale in that it was entirely completed in Mississippi, and the contract therefor was not for a sale and delivery across state lines. There was no common carrier. There was no point of destination where the gasoline could be delivered. The goods were moved from Biloxi, Mississippi, to the marshes of Louisiana near Grant's Pass, Louisiana, entirely at the direction and under the supervision of and by the packing company itself. The gasoline was not delivered to the Packing Company at Grant's Pass. The Packing Company's boat apparently did not go to Grant's Pass. If the gasoline was delivered at all in Louisiana, it was delivered by the Packing Company to some fishermen with whom the Packing Company had contracted, and the entire movement of the gasoline from Biloxi, Mississippi, to the fishermen near Grant's Pass, Louisiana, was had and done from the beginning to the end entirely by the packing company. The so-called bill of lading had absolutely nothing at all to do with the movement of the gasoline. The gasoline was purchased on the order of the Packing Company, was delivered, received and paid for entirely within the State of Mississippi. Of

course, this purchase could not be prevented by a state law, because such a law would be an interference with interstate commerce, but certainly the state has the power to levy an excise tax upon the appellant for the privilege of engaging in the business of making such sales.

In State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164, we find the following:

> "A power to tax to this extent may be essential to the healthy existence of the state governments, and the Federal Constitution ought not to be so construed as to impair, much less to destroy, anything that is necessary to their efficient existence."

And from the same authority, the following is taken:

> "No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property belonging to natural persons, and to the same extent. We think also that such taxation may be paid upon a valuation, **or may be an excise**; and that, in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchise or upon the value of them, but they may demand a graduated contribution proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this and no forms of expression which have no meaning beyond this can be regarded as violating the constiution."

The first excise tax upon the sale of gasoline came

before the United States Supreme Court upon an interlocutory injunction to restrain collecting of a tax on gasoline, in Askren v. Continental Oil Co. (1920), 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. 355, where it is held that a statute imposing an annual license tax of $50.00 upon distributors of gasoline, and an excise tax of 2 cents per gallon upon all gasoline sold or used, is void as to the annual license tax, and is so far as the excise tax relates to the selling of gasoline in the original packages in which it was imported from other states, this being an interference with interstate commerce, but, if separable, it is valid as to the sales made from the original package after they are broken; and that an excise tax upon dealings in a commodity within a state is not shown to be a discrimination against the products of other states, by the mere fact that none of that commodity is produced in the state, but must necessarily be imported from other states. And in this same case, upon a final hearing in which other state treasurer had been substituted as party defendant, it is held in Bowman v. Continental Oil Co. (1921) 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606, that a statute of New Mexico imposing upon distributors an excise of 2 cents for each gallon of gasoline sold or used, and an annual license tax of $50.00 for each distributing station, place of business, or agency, is void so far as it affects gasoline sold in original packages, and still in interstate commerce; that the annual license tax is altogether void, since it applies both to interstate and intrastate business, but the excise tax, being capable of division as to interstate and intrastate business of the distributors, as also to the gasoline used by them in the business, and that the tax upon the sale and use is not a tax upon tangible property within the meaning of the state constitutional provision requiring taxes upon tangible property to be in proportion to the value of the property. The court says:

> "So far as the excise tax is concerned—imposed as it is upon the sale and use of gasoline according

to the number of gallons sold and used—the divisible nature of the subject render it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the state to enforce it with respect to domestic transactions . . . But with the license tax it is otherwise. If the state is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic, and the tax is void."

And further:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same station and by the same agencies, the license tax cannot be enforced at all without interference with interstate commerce, unless it be enforced otherwise than as prescribed by the statute,—that is to say, without authority of law.

Section 2, chapter 115, Mississippi Laws of 1924 and Sections 1 and 3, chapter 119, Mississippi Laws of 1926 apply to "any person engaged in business of distributor of gasoline, or retail dealer in gasoline." There is absolutely no discrimination. These same statutes also disavow a purpose to exact payment of an excise tax for the privilege of carrying on interstate commerce.

In a later case (Sonneborn Bros. v. Cureton (Sonne-

born Bros. v. Keeling) (1923) 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643) it is held that gasoline, still in the original packages of interstate transportation, which has reached its destination in a state and come to rest for purposes of sale, might be taxed by the state provided that other gasoline is taxed equally and no unjust discrimination is made. Under the decision of this case only gasoline sold before it reaches the state of taxation is exempt under the interstate commerce clause while it remains in the original package. It is held that a tax levied under a statute providing that every individual, firm, or corporation, foreign or domestic, engaging as a wholesale dealer in coal oil or other oils refined from petroleum, shall make a quarterly report to the state comptroller, showing the gross amounts collected and uncollected from any and all sales made within the state during the quarter next preceding, and that an occupation tax shall be paid by such dealer equal to 2 per cent of the gross amount of such sales, collected or uncollected, is valid when levied upon a dealer in pretroleum products which have been transported into the state and held for sale in original packages of transportation, and subsequently sold and delivered in the state in such packages, and is not an unconstitutional regulation of, or burden upon, interstate commerce, where the tax is uniform on all dealers in petroleum products in the state; but that sales of petroleum products in original packages, made before the products to fulfil the sales have reached the state, and the solicitation of orders for such products, are not, in view of the commerce clause of the Federal Constitution, subject to taxation by a state, being an unlawful burden on interstate commerce whether the receipts from intrastate sales are equally taxed or not. In regard to the sales made within the state of petroleum products still in the original packages of transportation, but which had been deposited in warehouses or storerooms for purposes of sale, the court says:

> "The oil had come to a state of rest in the warehouse of the appellants (oil dealers), and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and, whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

And, as to the holdings of, and language used in, Standard Oil Co. v. Graves (1919) 249 U. S. 389, 63 L. Ed. 662, 39 Sup. Ct. Rep. 320; Askren v. Continental Oil Co. (1920) 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355, Bowman v. Continental Oil Co. (1921) 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606; and Texas Co. v. Brown (1922) 258 U. S. 466, 66 L. Ed. 721, 42 Sup. Ct. Rep. 375, which would indicate that gasoline brought into a state and stored for purposes of sale in the original packages of interstate commerce would be exempt from taxation by the state, because such would be a burden and regulation of interstate commerce, the court is of the opinion that they do not correctly state the law saying:

> "Upon full consideration and after a reargument, we cannot think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the state, can be justified either by reason or authority; and to this extent the opinions in the cases cited are qualified."

The court holds that this question is well settled upon the authority of Woodruff v. Parham (1869) 8 Wall. (U. S.) 123, 19 L. Ed. 382, and the cases following the rule of that case.

In the case of Sonneborn Bros. v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct.

Rep. 643, the following is found:

> "Counsel for the appellant cite the case of Dahnke-Walker Mill. Co. v. Bondurant, 257 U. S. 282, 290, 66 L. Ed. 239, 244, 42 Sup. Ct. Rep. 106, as aiding their argument that a tax on a sale of merchandise in an original package, brought from another state, is a tax on interstate commerce, and is different from an ad valorem property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky, to be delivered at a railway station in Kentucky, for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that state might nevertheless make and enforce without incurring that penalty of the state law. It was said in that case (p. 290) that 'where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182.' But this language has no relevancy to show that a tax without discrimination, on goods, after the transportation ceases, is a burden on interstate commerce—a proposition negatived in the

> American Steel & Wire Co. Case, it cites—or that a different rule should apply to an ad valorem property tax from that in case of a tax on sales."

From that portion of this opinion quoted above, it appears that the entire argument made by counsel for appellant in regard to what constitutes interstate commerce has no application to the case at bar; but the question in this case is whether the State of Mississippi has the power to tax the sale of gasoline when such gasoline is (directly after the sale) transported by the purchaser from Mississippi to Louisiana, where it is re-sold.

Quoting further from the opinion in the case of Sonneborn Bros. v. Keeling, 262 U. S. 504, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643:

> "Many of the sales by the appellant were made by them before the oil to fulfill the sales was sent state authorities as exempt from state taxation. They were, in effect, contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence, and any state tax upon it is a regulation of it and a burden upon it."

It follows from this opinion that the sale of gasoline by the appellant to the Packing Company, both of whom being residents of Mississippi, and the contract for the sale and delivery of the gasoline being consummated and completed by the delivery of the gasoline to the Packing Company and payment therefor being in the State of Mississippi, that such sales are not exempt from taxation by the State of Mississippi merely because the Packing Company moves the gasoline purchased from Mississippi to Louisiana where it is re-sold.

It has been announced in many decisions of this Court that:

> "Where goods in one state are transported to

another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182."

Practically all of the argument made by counsel for the appellant is based upon the foregoing definition of interstate commerce.

Counsel for appellant, however, overlook the fact that the language of this definition of interstate commerce has no relevancy to show that a tax without discrimination on the sale of goods after the transportation ceases or before the transportation begins is a burden on interstate commerce. It is expressly decided in the case of Sonneborn Bros. v. Keeling, 262 U. S. 504, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643, that:

> "This language has no relevancy to show that a tax without discrimination on goods after the transportation ceases is a burden on interstate commerce—a proposition negatived in the American Steel & Wire Company case, it cites—or that a different rule should apply to an ad valorem property tax from that in case of a tax on sales."

It follows that the language of this definition of interstate commerce has no relevancy to show that a tax on the sale of goods before the transportation begins is a burden on interstate commerce. The contracts for the sale and delivery of the gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to be exempt from State taxation under the Commerce Clause (Article

1, Section 8) of the United States Constitution. Sonneborn Bros. v. Keeling, 262 U. S. 504, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643.

The facts in the case at bar do not present a contract of sale and delivery of gasoline across the state line between Mississippi and Louisiana. The contract here is for a local sale and delivery at Biloxi, Mississippi. If the gasoline is moved across the state line at all it is done so by the Packing Company in carrying out its contract to furnish gasoline to the fishermen who catch oysters and shrimp in the waters of Louisiana for the Packing Company.

In the case of Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38, the Banker Bros. Co., a corporation doing business in Pittsburgh, was charged as retail vendors with a tax of 1% on $351,000.00 on sales of automobiles to persons in Pennsylvania, under a statute of that State. It denied liability on the ground that the sales were in interstate transactions. A decision of that point involved the question as to whether Banker Bros. Co. acted as principal or agent of a New York Manufacturer. It appeared that the George N. Pierce Company was engaged in the business of manufacturing automobiles in Buffalo and made a contract with the Banker Brothers Company to build and sell automobiles to the Banker Bros. Co. at 20% less that list price, deliveries to be f. o. b. Buffalo, and payments to be made in cash. The Banker Bros. Co. kept no machines in stock except those used for demonstration. The purchaser of the automobile from the Banker Bros. Co. made a separate contract with the Banker Bros. Company whereby the Banker Bros. Co. secured the automobile from the manufacturer and sold it to the purchaser at the list price. The manufacturer delivered the automobile to Banker Bros. Co. and payment was made to the manufacturer therefor by the Banker Bros. Company. After the delivery of the

automobile to the Banker Bros. Co. they in turn delivered it to the purchaser. It was contended that the Banker Bros. Co. were agents, and the Pierce Company the undisclosed principal. It was urged that the same was an interstate transaction between the manufacturer and the purchaser, with Banker Bros. Co. merely acting as an agent for looking after the delivery and collecting the purchase price. In deciding this question, this Court held:

> "This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburgh purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.
>
> "The name of Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom he alone dealt. If he had failed to complete the purchase, the Pierce Company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because with the machine, Banker Brothers Company also delivered to the buyer in Pittsburgh a warrant from the manufacturer direct.
>
> "These were mere incidents of the intra-state

contract of sale between Banker Bros. Company and the purchaser in Pittsburgh, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 438, 24 Sup. Ct. Reo. 265; American Express Co. v. Iowa, 196 U. S. 146, 49 L. Ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

The facts in the case of Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38, are very similar to the facts in the case at bar, except that the interstate movement of the goods sold was prior to the local sale. In the case at bar, a contract for the sale and delivery of gasoline was made and completed at Biloxi, Mississisppi, between the appellant and the Packing Company. Thereafter the Packing Company delivered the gasoline from Mississippi to Louisiana to said fishermen with whom the Packing Company had contracted. These two contracts are entirely separate. The fact that the Packing Company moved the gasoline from Mississippi to Louisiana in carrying out its contract with the fishermen is a mere incident of the intra-state contract of sale between the appellant and the Packing Company in Mississippi.

The case of Kuhn and Son, Inc., v. Letts, 50 Appellate (D. C.) 104, 267 Fed. 748-749, involved a trade mark under the trade mark act (33 Stat. 724, Sec. 2 Compiled Stat; Section 9487). This Trade Mark Act requires an applicant for registration to accompany his application by written declaration verified by the

applicant that such trade mark is used in commerce among the several states, or with foreign nations or Indian tribes. In considering what was meant by the use of a trade mark in "commerce among the several states," the Court held:

> "Clearly the use contemplated by the statute is a use by the applicant himself or by someone for him, and not an independent or incidental use by a third party; the reason being that before applicant is entitled to registration he must show that his business extends beyond boundaries of his own state or into the territory of an Indian tribe. Appellee's business, so far as the present record shows is local. That persons outside the State procured appellee's goods in California and had them sent outside that state is beside the question, for appellee was in no way responsible for, and hence could not benefit by such transaction. The sale was local and not interstate."

CONCLUSION

It is, therefore, respectfully submitted that the Mississippi statutes complained of as applied to the facts in this case do not violate the commerce clause of the Constitution of the United States; that the State of Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser both being residents of the same state and the sale being completed in the same state and does not thereby place a burden upon interstate commerce, even though the purchaser moves the gasoline to another state; that the State of Mississippi has the power to tax the privilege of engaging in the sale and distribution of gasoline in Mississippi; that the State of Mississippi's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce; that the contracts for the sale and delivery of gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to

be exempt from state taxation (where the state taxes such sales) under the commerce clause (Article 1, Section 8, Clause 3,) of the United States Constitution; that a tax without discrimination on the sale of gasoline after the interstate transportation ceases, or before the transportation begins, is not a burden on interstate commerce where such sales were entirely contracted for and completed within the State of Mississippi; that the judgment of the Supreme Court of the State of Mississippi, appealed from, was not erroneous and should be affirmed.

Respectfully submitted,

GEORGE T. MITCHELL,

Attorney General of the State of Mississippi,

By James W. Cassedy, Jr.,

Assistant Attorney General.

E. C. Sharp,
Of Counsel.

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CHARLES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

NO. 28.

SUPERIOR OIL COMPANY, Appellant,

VS.

STATE OF MISSISSIPPI, EX REL

RUSH H. KNOX, ATTORNEY GENERAL.

PETITION FOR REHEARING.

WM. H. WATKINS,
W. LEE GUICE,
Attorneys for Appellant.

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In The Supreme Court of The United States

OCTOBER TERM, 1929

NO. 28.

SUPERIOR OIL COMPANY, Appellant,

VS.

STATE OF MISSISSIPPI, EX REL

RUSH H. KNOX, ATTORNEY GENERAL.

PETITION FOR REHEARING.

This Honorable Court affirmed the judgment of the Supreme Court of Mississippi upon the theory that while the facts in this case may have constituted interstate commerce, under the authority of *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13-14, and *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62, the results of the transactions not being fixed and definite, that the interest of the State in the right to tax would rise superior to the possibility that the transaction was in interstate commerce, especially in

view of the fact that the transportation was in the vessels of the purchaser, and not by means of a common carrier.

We have carefully considered the cases cited above and the record in the case including the opinion rendered by Your Honors, as well as the Supreme Court of Mississippi; and as under the facts admitted by the Court, in our opinion the decision overrules a number of well considered and established cases, including *Hughes Bros. v. Minnesota*, 272 U. S. 469, and *Champlain Realty Co. v. Brattleboro*, 260 U. S. 366, we feel that we may with respect ask the Court to consider whether or not this be a case in which it will be proper to grant a rehearing to the appellant, especially in view of the fact that the record will disclose that proceeding on the theory that the shipments were in interstate commerce, no tax was collected by the appellant, R. page 39, and, therefore, if a doubt exists in the mind of the Court, such doubt should be resolved in favor of the taxpayer, as well as the fact of the well determined rules governing the question of interstate commerce prior to this decision, as firmly established in the Hughes Bros. and Champlain Realty Company cases.

We would, therefore, with the utmost respect suggest to the Court that under its finding the cause would have .been reversed had the transportation been by common carrier, and that the opinion makes this test a deciding factor, which though we think the Court may reconsider in view of the two following propositions that we shall urge upon the Court as the reasons for a rehearing, viz:

First: The record including the finding of fact by Your

Honors shows that appellant was following a well established course of business in making the sales of gasoline charged against it, and without interruption carried or transported this gasoline across the borders of the State of Mississippi.

Second: That whether or not the gasoline was transported in the purchaser's vessels is not decisive of the nature of the commerce, but the possibility of diversion of the goods always yields to the party's intent and the transportation actually accomplished, which propositions we shall now try to briefly demonstrate.

FIRST

The record including the finding of fact by Your Honors shows that appellant was following a well established course of business in making the sales of gasoline charged against it, and without interruption carried or transported this gasoline across the borders of the State of Mississippi.

We shall first quote from the facts as found by Your Honors:

"The facts are as follows. The Superior Oil Company, a corporation created and doing business in Mississippi, sold gasoline to packers in Biloxi in that state and delivered it at the packers' wharves. The latter loaded the oil upon their own fishing boats and sent it out to the neighborhood of Grant's Pass, Louisiana, where they delivered it to shrimp fishermen for use in fishing."

The only testimony in the record as to the nature of Grant's Pass shows that it was a station where all boats fishing in Louisiana were required to secure permits or Licenses; R. Page 39, and although the purchaser might have diverted the shipment, the undisputed and acknowledged facts show that not only was this not done, but that the gasoline was purchased for the purpose of use in Louisiana, was at once carried there, and actually used as an instrumentality in carrying on a business recognized by this court as interstate commerce. See *Foster-Fountain v. Haydel*, 73 L. E. 147, 278 U. S. 1.

The distinction between the facts and the proposition before the Court in the case of *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13-14, cited by Your Honors, is that in the latter case, whether or not the car was to be used in interstate commerce was a disputed fact, the car in question was not moving in foreign commerce, but it was contended that it was intended for this purpose. However, the court recognized that even the intent would govern if properly placed before the jury, saying in part:

> "This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate."

As well as in the case of *Kalem Co. v. Harper Brothers*, 222 U. S. 55, cited by Your Honors, this court recognized

that while a merely incidental connection with a transaction would not impart guilty knowledge, one would be held for acts expecting a certain accomplishment, especially if the results were as expected, we call to the court's attention that no question of interstate commerce was before the court in the cited case.

Ignoring the bill of lading used by the appellant, we have here a case where are found the following essential elements of interstate commerce, viz:

First: Intent and a regular course of business in volume as large as the fishing industry of Mississippi. See R. pages 38-39.

Second: Transportation without a break in its continuity.

Third: The actual crossing of state boundaries of an article of commerce in large quantities and its use in such state to carry on water borne commerce.

The facts of the above are not disputed in the record, briefs or opinion of the Court, and we would most respectfully submit that they constitute interstate commerce, freed from even the duty to pay tribute to a state, and that the nature of such commerce is not changed by the method of transportation used. Therefore we say:

SECOND

That whether or not the gasoline was transported in the purchaser's vessels is not decisive of the nature of the commerce, but the possibility of diver-

sion of the goods always yields to the party's intent and the transportation actually accomplished.

We call to the Court's attention that the Court was greatly influenced by the fact that the transportation to Louisiana of the gasoline was upon the vessels of the purchaser, and that, therefore, there existed the possibility that the purchasers might have diverted this gasoline and its foreign destination changed; in fact, the Court intimated that had the gasoline by mutual agreement been put in the hands of a third person, a common carrier, for transportation, the mere posibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to take the transaction out of interstate commerce, the Court citing the case of *Spalding Bros. v. Edwards,* 262 U. S. 66, a case very analogous to the case at bar, except that the transportation was by means of a common carrier and to a foreign country. And, also, citing the case of *Sonneborn Brothers v. Cureton,* 262 U. S. 506, in which case, we again respectfully call the Court's attention to the fact that although this case was cited very earnestly by the appellee in its original brief, no effort was ever made by Texas to collect for gasoline from sales to be delivered out of the state. The proposition as to whether or not interstate commerce is governed by a type of transportation; that is, whether transported by a person in his vehicle or upon his own person, or whether transported by a common carrier has many times been before this Court; and unless we are gravely in error, it has not influenced the Court in its decision as to what constituted interstate commerce when all other elements of interstate commerce were present prior to the decision of the case at bar.

We find that this question was ably considered by Chief Justice Taft in the case of *Hughes Brothers Timber Co. v. State of Minnesota*, 272 U. S. 469, 71 L. Ed. 359. This was an effort of the State of Minnesota, not only to impress a tax but an ad valorem tax on timber which had grown and had been marketed in the State of Minnesota, and was being moved out of Minnesota by means of the public rivers of Minnesota and the private transportation of the owner of the timber. *In that case the logs held to be non-taxable were delivered by the vendor to the vendee's boats in the State of Minnesota. The facts in that case can not be distinguished from the facts in this case.* The Court in the opinion used the following language:

> "This court distinguished the facts in this case from the facts in the main case discussed in *Coe v. Errol*, 116 U. S. 517, 59 L. Ed. 715, 6 Sup. Ct. Rep. 475, as they can be distinguished here. It is clear that the entrepot or depot for the interstate shipment of logs was in the Swamp river. The drive in the two rivers though under the direction of the Timber Company, was not gathering the logs for subsequent interstate shipment, it was the interstate movement itself. Both parties intended interstate shipment, they had bound themselves to it, the logs were segregated and were moving in the contemplated journey which neither could prevent if they carried out their agreement. The delays in the continuity of movement were only incidental to the journey and the necessary change in the mode of transportation by which the logs were carried from a place in one state to a place agreed upon in another.

"The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination as in the Champlain Company case. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the Champlain Company case."

In the case of *Champlain Realty Company v. Brattleboro*, 260 U. S. 366, 67 L. Ed. 309, the court used the following language to explain that such transportation, even though by the owner, constituted interstate commerce, even though there were necessary breaks in the continuity of the transportation:

"The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discrimina-

tive unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken. *State, Demold, Prosecutor, v. Engle*, 34 N. J. L. 425, 435; *State, Lehigh & W. Coal Co., Prosecutor, v. Carigan*, 39 N. J. L. 36. This was the case in *Kelly v. Rhoads*, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 25, in which sheep driven 500 miles from Utah to Nebraska, which traveled 9 miles a day, were held immune from taxation in Wyoming, where they stopped and grazed on their way."

In the case of *United States v. Hill*, 248 U. S. 420, 63 L. Ed. 337, in which it was held that the transportation of liquor upon the person of one being carried in interstate commerce is in itself interstate commerce, the Court used in part the following language:

"The Constitution confers upon Congress the power to regulate commerce among the states. From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. *Gibbons v. Ogden*, 9 Wheat, 1, 188, 6 L. Ed. 23, 68; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. Ed. 158, 161, 1 Inters. Commerce Rep. 382, 5 Sup. Ct. Rep. 826. 'Importation into one state from another is the in-

dispensable element—the test—of interstate commerce.' *International Textbook Co. v. Pigg*, 217 U. S. 91, 107, 54 L. Ed. 678, 685, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *The Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 345, 47 L. Ed. 492, 496, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561. The transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of Congress. *Pipe Line Cases* (*United States v. Ohio Oil Co.*), 234 U. S. 548, 560, 58 L. Ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words, 'interstate commerce.' *United States v. Chavez*, 228 U. S. 525, 532, 57 L. Ed. 950, 952, 33 Sup. Ct. Rep. 595."

In the case of *Kirmeyer v. Kansas*, 236 U. S. 568, 59 L. Ed. 721, a case involving the right of Kansas to prevent the introduction of liquor into its borders, which had been a part of the public policy and express law of the state for many years, the court held that this law must bow to the introduction in interstate commerce of liquor into Kansas, even though the transportation was by the owner in a vehicle owned by him, Justice McReynolds using in part the following language in deciding this case:

"The foregoing cases and those cited therein we also regard as controlling authority in support of the claim that the business carried on by plaintiff in error within the State of Kansas was interstate commerce. That the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater dis-

> tance, does not change the applicable rule. Nor did the mere adoption of cumbersome and expensive methods render the business intrastate,—that must be tested by the actual transactions."

We also call to the attention of the court the whole philosophy expressed in what is a monumental case on the question of the right to tax goods intended for or actually in transportation in interstate commerce.

The case of *Goe v. Errol*, 116 U. S. 517, 29 L. Ed. 715. In this case, the Court most exhaustively went into the question of whether or not the property owned by Goe was taxable in New Hampshire; and, although it decided that such property was in fact taxable, the question of its transportation by the owner was not alluded to as a basis upon which to base such right of taxation. In fact, the Court, in leading up to its final conclusion, expressed the opinion that the manner of transportation would be of no importance, provided that such transportation actually took place, using the following language:

> "This question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation."

And in the *Pipe Line Cases, United States v. Ohio Oil Co.*, 234 U. S. 548, Your Honors held that the method of transportation, that is, whether or not by the owner, was not conclusive on the question as to whether or not such transportation constituted interstate commerce, but, on the contrary, if all the essential facts of transportation from one state to another were present, interstate commerce would arise regardless of whether or not the owner of the article was also engaged in the transportation of it.

In the case of *Kelly v. Rhoades*, 188 U. S. 1, 47 L. E. 359, ,the owner of a herd of ten thousand sheep drove them from Utah through the State of Wyoming on the way to Nebraska for the purpose of selling the sheep. They traveled about nine miles per day, grazing somewhat in their onward travels. The statutes of Wyoming levied a tax upon cattle grazing, and it will be observed that the tax was an occupation tax as is the one under discussion. The state court held that the owner was liable therefor. This Court held on appeal that the cattle were moving in interstate commerce, and not subject to state taxation. In that case, the owner was driving his own cattle through the State of Wyoming on the way to Nebraska. He might have diverted them and sold them in Wyoming if he felt disposed to do so, and it does not appear that the cattle were bound for any fixed destination in the State of Nebraska. They were being taken there for sale wherever purchasers might be found.

The case of *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 66 L. E. 227, is directly in point. In that case, oil

was assembled by a pipe line company for various producers. The large portion of it flowed out of the state, but the pipe line company had the authority to determine the destination of the oil. A portion of it was delivered in the State of Virginia. This court held that the commodity was moving in interstate commerce and not subject to state taxation, using the following language:

> "It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company, not the producer, was the master of the destination of any specific oil. Therefore, its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed."

Intertsate commerce manifests itself in two ways; it enters the state or it moves out. It has been thoroughly settled that incoming commodities relinquish intertsate characteristics when such property comes to a rest in the state and forms part of the general mass of property in the state. See *Sonneborn Bros. v. Cureton*, supra.

In the present case, we have the converse, property moving out of the state. From the foregoing authorities, it is well settled that in such case, property moving from one state to another is in interstate commerce and free from state taxation when it starts on its intertsate journey. Such

test should be applied in this case, and not that of method of transportation. The vendor, appellant, contracted to maintain on hand sufficient gasoline to answer the requirements of the packers. When directed by a packer, the appellant put the gasoline into a sealed container, and as part of the contract of sale, started the gasoline on its intertsate journey by transporting the same from its station where its tanks were maintained to the packers' wharf, at which point, the packers, through a uniform course of businses, without interruption, transported the sealed container to the State of Louisiana, where they were sold to fishermen.

Your Honors, we respectfully submit, applied the erroneous test of method of transportation. The test which should be applied in the present case is not the method of transportation, but as to whether or not the appellant, as part of the contract of sale, started the gasoline on its interstate journey . In other words, the appellant contracted to do more than merely sell the gasoline in Mississippi; the appellant contracted and agreed to actually perform part of the interstate transportation, which was that of carrying the gasoline from its place of business to the packers' wharf. It is conceded in this case by the appellee that there was no diversion and that every particle of the gasoline started on the intertsate journey for the appellant was actually transported beyond the limits of the State of Mississippi, the volume of which business appears, R. 17-30.

We would, therefore, suggest to the Court that the liability vel non of the appellant for the tax in this case was to be determined wholly on the question of whether or not the gasoline was sold for the purpose of being carried into

another state, was by a continuous journey carried into another state and delivered in such other state, and not on the question as to whether or not it was carried by the purchaser in his own vessels with the necessary right of the purchaser to divert his own vessels. The whole record speaks without dispute in support of the fact that from the very beginning there was an intent to purchase gasoline for the purpose of such transportation; that immediately a delivery took place, followed by a journey on the public waters of the state to another state where the gasoline was used. The record further shows that there was an agreement to have this gasoline on hand for such commerce, and that it was an absolutely necessary factor in carrying on the commercial intercourse had with Louisiana in fishing for shrimp and oysters in Louisiana. In other words, it was used for the purpose of enabling the citizens of Mississippi to carry on a very important course of commerce with citizens of the State of Louisiana. The record discloses that there were no railroads or other common carriers touching in or about the point where it was necessary for the fishermen to be supplied with a means of creating power to be used in their boats. These boats were being used in interstate commerce as they carried on that type of intercourse between the State of Louisiana and the State of Mississippi. In the case of *Helson v. Commonwealth of Kentucky*, 279 U. S. 245, 73 L. Ed. 683, the gasoline used in propelling a vessel engaged in interstate commerce would be free from taxation regardless of anything except the fact that it was used in furtherance of such commerce. This proposition was sustained in the Helson case in the following language:

"And is not the fuel consumed in propelling

> the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax can not be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax can not be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states.' *Gloucester Ferry Co. v. Pennsylvania*, supra, page 214."

This argument is based wholly upon the thought that there was no question in the court's mind but that the gasoline was purchased in Mississippi for transportation to Louisiana and was so transported and used in Louisiana, as there is no intimation in the court's opinion of any contrary view. This being true, unless the court should depart from its finding in *Coe v. Errol, Hughes Bros. v. Minnesota, Champlain Realty Co. v. Brattleboro* and numerous other cases, the fact that the gasoline was in the hands of the purchaser to do with it as it liked would be meaningless provided the court was of the opinion that the power of such diversion did not influence the journey, and, in fact, no such diversion occurred; for, unless we are wholly wrong in our construction of the cases above referred to, the mere power of the owner to divert the shipment was not a controlling factor, but the facts and circumstances of the transportation alone control.

In the opinion of the Court, reference is also made to the case of *Lemke Milling Co. v. Farmers' Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, in explaining that circumstances, such as the universal movement of grain from a state to a market, would influence the legal conclusions otherwise surrounding certain facts, and while we must admit that in volume, value and amount the products of a great state like North Dakota vastly exceed the total of the value of the fishing business of Mississippi, yet, to the inhabitants of that small area, who are wholly sustained by their commerce in fishing, the importance of the industry is just as great, and certainly they would be entitled to a recognition of their commerce as being interstate in character, when all of the circumstances surrounding this commerce are much more perfect in detail than were the circumstances surrounding the commerce in the case referred to by Your Honors. For instance, in the Lemke case, the grain was raised in Dakota and the title passed to the elevator in Dakota, and while a vast amount of the grain reached its ultimate market in Minnesota, still, some of it was diverted for milling purposes in the state of its purchase. In other words, in the cited case, a partial diversion actually took place; yet, Your Honors recognizing the necessity for the protection of commerce from any attacks, gave to all of the grain the status of interstate commerce so that adequate protection could be afforded that great major portion which went out into the commercial channels of the various states of the Union. However, in the case before the Court, there is not even a suggestion of the diversion of one gallon of this gasoline. It was kept on hand in Biloxi so that the wants of the persons engaged in commerce in Louisiana could be supplied. It was purchased for this purpose, and, without a break in

the continuity of transportation, was transported for this purpose and finally used for this purpose.

Here we will ask the Court to consider with us the great import to this country of commerce in fishing for sea foods, &c.; that day by day, the government itself is recognizing, not only the tremendous value of this vast reservoir of food to the people of this country, but is endeavoring to perpetuate this value and to increase the supply, so that when other resources are exhausted and depleted as in so many older countries, we will have the sea to turn back to. Certainly, when commerce of such an article is carried on with so many states, it would rise to equal dignity with any other article of value and use to the citizens of the various states. If we give it this dignity, then, the power of diversion of this gasoline, even though exercised by the owner, would not prevent it from being protected by the Commerce Clause under the holding of the Court and the theory advanced by Justice McReynolds in the case of *Helson v. Kentucky*, supra.

We agree with the Court that the life blood of a state is its taxes and that this precious value should be given every protection that can be afforded it by the laws of this land. However, the states would be nerveless without the great open channels of commerce which under the guidance of our great Chief Justice Marshall were made free for all the citizens of our land, whether operating steam boats, railroads, ox teams or flat boats, and we believe that the right of this freedom rises paramount even to the right of taxation, and if this be true, this right belongs equally to those who in their own boats go down into the sea to bring

back to the balance of the country the wealth of their catches as well as it does to other more fortunately situated persons, who are able to carry on their commerce through the great channels of the common carriers of this country.

We therefore say to the Court that unless the Court shall adopt the theory that the Commerce Clause is meaningless except as to articles transported from state to state by means of a common carrier, a rehearing in this cause should be granted, so that if possible the Court might reconsider its decision that the private ownership of a means of transportation will not govern the construction to be placed on whether or not such transportation is in interstate commerce in cases where there is a sale for interstate commerce in continuous transportation from one state to another and delivery into the channels of commerce of such other state.

Wherefore, upon the foregoing grounds, this appellant and petitioner respectfully prays this Honorable Court to grant it a rehearing of said cause.

WM. H. WATKINS,
W. LEE GUICE,
Attorneys for Appellant.

I, William H. Watkins, of counsel for the appellant herein, certify that the foregoing petition for rehearing is presented in good faith, and not for delay .

This, the 22nd day of March, 1930.

WILLIAM H. WATKINS,
Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1929.

Superior Oil Company, Appellant, *vs.* The State of Mississippi *ex rel.* Rush H. Knox, Attorney General.	Appeal from the Supreme Court of the State of Mississippi.

[February 24, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by the State of Mississippi to collect a tax on distributors of gasoline of three and four cents respectively per gallon sold, according to the statute in force at the time of the sales. The defence was that the sales were in interstate commerce. The Supreme Court of the State upheld the tax, 119 So. Rep. 360, and the defendant, the Superior Oil Company, appealed to this Court on the ground that the statutes as applied violated the commerce clause of the Constitution of the United States. Article 1, Section 8.

The facts are as follows. The Superior Oil Company, a corporation created and doing business in Mississippi, sold gasoline to packers in Biloxi in that State and delivered it at the packers' wharves. The latter loaded the oil upon their own fishing boats and sent it out to the neighborhood of Grants Pass, Louisiana, where they delivered it to shrimp fishermen for use in fishing. The fishermen brought their catch back to Biloxi, sold it to the packers and were charged with the cost of the oil in account. The appellant received in each case from the purchaser what is called a bill of lading, signed by the master of the boat on which the oil was loaded and reading in part: "Consigned to Gussie Fontaine Pkg. Co. [or other purchasers]. Destination: Grants Pass, La. By boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co." The instrument then provided that "the property consigned herein remains the property of said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination", with provisions throwing all risks upon the purchasers. The

seller of course paid no freight. The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. There was no point of destination for delivering of the oil but merely a neighborhood in which the packers that had bought it and already held it expected to sell it again. The document hardly can affect the case, because it is "not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause"; *Browning* v. *Waycross,* 233 U. S. 16, 23; at least when the contract achieves nothing else.

The importance of the commerce clause to the Union of course is very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts. We may admit that this case is near the line. There was a regular course of business known to the appellant, that took the gasoline into another State, and if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce. *A. G. Spalding & Bros.* v. *Edwards,* 262 U. S. 66, (a case of foreign export, see *Sonneborn Brothers* v. *Cureton,* 262 U. S. 506, 520, 521). But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself, the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the State line. A distinction has been taken between sales made with a view to a certain result and those made simply with indifferent knowledge that the buyer contemplates that result. *Louisville & Nashville R. R. Co.* v. *Parker,* 242 U. S. 13, 14. *Kalem Co.* v. *Harper Brothers,* 222 U. S. 55, 62. The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana and hoped not to be in Mississippi. The fact that it desired to

evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it. *Bullen* v. *Wisconsin*, 240 U. S. 625, 630, 631. But on the other hand the desire to make its act an act in commerce among the States was equally unimportant when it was apparent that the buyer's journey to Louisiana was accidental so far as the appellant was concerned. It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the State of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here.

Judgment affirmed.

Mr. Justice VAN DEVANTER and Mr. Justice BUTLER dissent.

A true copy.

Test:

Clerk, Supreme Court, U. S.